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Vol. III

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]32

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 3, 1923.

CERTIORARI AND RETURN FILED JULY 31, 1923.

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(28,812)

SUPREME COURT OF THE UNITED STATES.

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VOLUME III.

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1 VOL. 3.

In the District Court of the United States for the Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Answer.

Filed January 29, 1915.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The answer of William R. Warner & Company, a corporation, to the bill of complaint in the above entitled case showeth as follows:

1. The averments of paragraph 1 are admitted, except the averment that "Coco-Quinine" is a compound of high medicinal value. It has the medicinal value of quinine, the chocolate merely acting as a vehicle, used to make the quinine more palatable.

2 2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession, but avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and disguising its bitter taste. It has no knowledge as to whether the product was the result of long study and expensive experiment. It denies that the said compound became widely and favorably known as a remedy except in the sense that it was a product which enabled the administration of quinine in a more palatable form.

3. It is denied that the plaintiff, for the purpose of identifying its product, made the compound of a special color commonly called chocolate. The defendant avers that the plaintiff's compound merely has substantially the natural color of chocolate, of which it is in part compounded.

4. The defendant denies that the plaintiff, as a means of identifying the origin of the said product, adopted a certain arbitrary selected flavor, to wit, chocolate. The defendant has no knowledge or in-

formation of any other syrups of other flavors that might be used for the same purpose as is averred in paragraph 4, and therefore denies that any such exist or are known, and avers that chocolate, while non-essential to the medicinal characteristics of the product, is essential to certain vital characteristics thereof.

5. The defendant admits that such product of the plaintiff has become known as "Coco-Quinine," but denies that has become so known by its color or flavor or by its medicinal effects, or in any other way than as a palatable preparation of quinine. The defendant admits that the name of the plaintiff's product has been recog-
3 nized, but denies that its color and flavor were and are recognized and freely acquiesced in by the trade.

Defendant further avers that compounds of quinine and chocolate, similar to plaintiff's, were manufactured and sold on the market by various drug manufacturers prior to the time when Searle & Hereth Company began to manufacture and sell "Quin-Coco."

6. The defendant admits the averments of paragraph 6, but avers that the sale of compounds of quinine and chocolate to consumers are almost universally made in doses, usually by druggists on physician's prescriptions.

7. The averments of paragraph 7 are admitted, except that it is averred that the plaintiff's product has no other reputation than as quinine in a palatable form and that its remedial action depends solely on the quinine contents.

8. The defendant admits that it is a corporation under the laws of Pennsylvania, and a citizen of said state; that its principal place of business is in Philadelphia, and that it is engaged in the manufacture and sale of medicinal products, and distributes the products of other concerns, including Searle & Hereth Company and Pfeiffer Chemical Company. It is admitted that about the year 1906 the Searle & Hereth Company began the manufacture and sale of a compound of quinine and chocolate. It is denied that it did so with any wrongful or fraudulent intent to divert and appropriate to its own use and own profit a part of the plaintiff's business in the sale of Coco-Quinine or with any other wrongful or fraudulent intent whatever. It is denied that it made its said product in exact imitation of the plaintiff's product. It is denied that it manufactured the same with the purpose and intent of selling it for a substitute for
4 the plaintiff's product and enabling druggists and others to substitute it for the plaintiff's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions. It is admitted that the defendant's product is of the same color and appearance substantially and of similar flavor as plaintiff's product, but it is averred that the color and appearance of plaintiff's product are due entirely to the chocolate ingredient, but that the flavor of defendant's product is not due to chocolate syrup alone, as is claimed for plaintiff's product, but is due to a combination of chocolate, vannalin and a special extract of yerba santa.

The defendant admits that the name "Quin-Coco" was adopted, but denies that the name and label used by the defendant are a close imitation or any imitation of the plaintiff's name and label, and that they are easily confused therewith. It denies that the defendant's product is a substantially exact imitation of and substitute for plaintiff's product and that it is so recognized in the trade. It avers that the label used on defendant's preparation is easily distinguishable from the plaintiff's label. It denies that Searle & Hereth Company offers the said product to plaintiff's customers, druggists and dealers, informing them that it could and can be used as a substitute for the plaintiff's product. It denies that druggists had any instructions as to any wrongful sale of defendant's product. It denies that defendant's product has been sold to the trade on such representations (at least by the knowledge, authority or permission of the defendant) and that it has been sold by druggists, upon any instructions from defendant to supply demands from customers for plaintiff's product, by authority, or to the knowledge of defendant.

9. It is denied that the defendant has ever made renewed efforts or any efforts to push its product in the drug trade and medical profession as a substitute for the plaintiff's product, except in the way of fair and lawful business competition. It is denied that the Searle & Hereth Company is merged into the business of the Pfeiffer Chemical Company. It is admitted that the same individuals subsequently became interested in all three of the companies mentioned in paragraph 9, and that the defendant is the distributor of "Quin-Coco." It is denied that the defendant has by many and divers ways and schemes or otherwise, in placing its said product on the market represented, through its agents and salesmen to purchasing druggists and physicians that its said product could be furnished in lieu of plaintiff's product when called for by customers or by physicians' prescriptions. There was no connection between defendant and Searle & Hereth Company until late in the year 1908.

It is denied that druggists have, as averred in this paragraph, received any instructions from defendant as to selling "Quin-Coco" for "Coco-Quinine." The defendant is without knowledge or information that druggists ave sold and are now selling "Quin-Coco" for "Coco-Quinine"; but it avers that if any druggist has done so it hase been without the instruction, suggestion or knowledge of the defendant.

The defendant has no knowledge or information that customers frequently receive "Quin-Coco" with the druggists' own label, but bearing the name of "Coco-Quinine," but avers that if such has ever been the case, it has been without the knowledge, instruction, representation or suggestion of the defendant, and has been done by such druggists' own unaided volition. The defendation denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy "Coco-Quinine." The defendant denies that it has by any

unlawful or wrongful method whatever pushed the sale and
6 distribution to the trade of "Quin-Coco," and that its product has been retailed as "Coco-Quinine."

10. The defendant denies that its product is inferior in quality and medicinal properties to the plaintiff's product; but it avers that the medicinal action is due to the quinine content, and that the amount of this, according to the labels of both plaintiff and defendant, is the same in each case. It is denied that defendant's sals have ever unlawfully deprived the plaintiff of profits to which it was justly entitled. The defendant denies that it has by any unlawful act injured the reputation of plaintiff's product or in any way unlawfully interfered with the demand therefor, and that any act of defendant has resulted in defrauding the public by giving the public a different product from that demanded. It is denied that the defendants product is of less merit than the plaintiff's.

11. If the averments in paragraph 11 that the long continued use of the name "Coco-Quinine" has constituted it a valid trade mark, the defendant denies the averment. The defendant admits that "Coco-Quinine" has for many years been recognized in the trade as the product of the plaintiff. The defendant denies that the color of the plaintiff's product has caused such color to be recognized in the trade as identifying the product as being that of the plaintiff, and that the chocolate flavor of the plaintiff's product has come to identify said product as being that of the plaintiff. The defendant denies infringement of any exclusive right of the plaintiff to the said name or color or flavor. The defendant is advised, and so avers, that the plaintiff is not entitled to any valid trade mark or exclusive right whatever in the premises, either by reason of the said name "Coco-Quinine" or the color or flavor of his product.

The defendant denies that it is guilty of infringement of any lawful right of the plaintiff in the color of its product or
7 the flavor thereof. The defendant denies that it adopted the name "Quin-Coco" and the color and flavor of its product, and has used the same with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to the defendant part of the plaintiff's trade and to enable its product to be palmed off on the public as and for the product of the plaintiff. The defendant is advised, and so avers, that it has a legal right to manufacture and sell a compound of quinine and chocolate, under the name of "Quin-Coco," and of the natural color and substantially of the flavor of chocolate, and that in doing so it has infringed upon no exclusive right of the plaintiff in the premises.

The defendant denies that it has artfully and fraudulently or in any way whatsoever, through its salesmen, agents, druggists, dealers and confederates, heretofore or ever substituted or is now substituting its product for the plaintiff's product or has injured the plaintiff or deceived the public or done any act or thing in the premises contrary to equity or fair dealing. The defendant avers, on the contrary, that it is and always has been lawfully selling its said product on its own merits, and in so doing has not committed any wrong

against the plaintiff or deceived the public, but has extended its sales by means of a large force of traveling salesmen and by free samples.

12. The defendant denies that the plaintiff has any exclusive right to the use of the color or the flavor of its said product. The defendant denies that it has in any way infringed upon the plaintiff's exclusive rights, and that it has in any way unlawfully caused or is now unlawfully causing the plaintiff any pecuniary loss, and that any act on its part has wrongfully or unlawfully or otherwise affected the plaintiff's reputation as a manufacturer of medicinal products.

8 And the defendant, for a further defense to the bill of complaint, says that it has since —, 1908, and the Searle & Hereth Company from 1906 to 1908, openly sold the product "Quin-Coco" to the trade, and that this has been known to the plaintiff, and that notwithstanding such knowledge, the plaintiff has made no objection to such sales, except one objection made in October, 1909, that defendant's prices were too low.

Wherefore the defendant prays that the plaintiff's bill be dismissed, and prays its reasonable costs in this behalf most wrongfully sustained.

[SEAL.] WM. R. WARNER & CO.
G. A. PFEIFFER,
Treas.

JOSEPH W. HENDERSON,
FRANCIS RAWLE,
For Defendant.

Deposition on behalf of the defendant taken before George Brodbeck, Esq., Special Examiner, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Wednesday, November 24, 1915, at 10 o'clock a. m.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the Plaintiff.
Francis Rawle, Esq., representing the Defendant.

GUSTAVUS A. PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

9 A. Gustavus A. Pfeiffer. 43 years old. Treasurer and General Manager of William R. Warner & Company. Residence, Philadelphia, Pa. I first became connected with William R. Warner & Company in July, 1908.

Q. 2. State briefly what had been your connection with the drug business before this?

A. I was connected with the retail drug business ever since I was a boy, first as a clerk, then as the owner of a drug store, and am a registered pharmacist, and was the owner of a drug store for about nine years. In 1901 I assisted in organizing the Pfeiffer Chemical Company, a manufacturing drug concern.

Q. 3. With headquarters in St. Louis?

A. With headquarters in St. Louis.

Q. 4. What are your affiliated companies at present?

A. At present the companies with which we are affiliated are The Searle & Hereth Company, the Dr. Earl S. Sloan, H. E. Bucklen & Company, Pfeiffer Chemical Company, and the E. E. Sutherland Medicine Company, and several others.

Q. 5. When was the product "Quin-Coco" first marketed?

A. In the fall of 1906, by the Pfeiffer Chemical Company.

Q. 6. Why was it introduced?

A. To supply the demand for a chocolate quinine mixture with the taste of the quinine sulphate masked or disguised.

Q. 7. Will you state whether or not that demand existed prior to its first introduction?

A. It did.

Q. 8. Who makes it now, and since 1908, and who sells it and who distributes it?

A. It is manufactured by The Searle & Hereth Company, and it is distributed by William R. Warner & Company.

10 Q. 9. To what trade?

A. To the retail drug trade and to the dispensing doctor and to the jobbing drug trade.

Q. 10. In what size bottles or containers?

A. It is supplied in two ounce bottles, four ounce bottles, pint bottles, five pint bottles and gallon bottles.

Q. 11. Has William R. Warner & Company been its sole distributors ever since August, 1908?

A. Almost exclusively. For a time after August, 1908, the Pfeiffer Chemical Company invoiced goods under the firm name of the Pfeiffer Chemical Company and acted as distributors for "Quin-Coco" in the territory handled by the Pfeiffer Chemical Company. Later, however, the Pfeiffer Chemical Company discontinued using their name in selling goods to the trade and for some time past William R. Warner & Company has handled and is the sole and exclusive distributor.

Q. 12. From your experience in the drug business what would you say the therapeutic effects of this preparation are due to?

A. Due to the quinine sulphate contained.

Q. 13. What would you say were the advantages of the preparation?

A. The advantage of "Quin-Coco" is that it supplies quinine sulphate in minute crystals undissolved, very much sub-divided, and held in suspension by the cocoa. This facilitates administration and absorption, and on account of the pleasant flavor and taste of chocolate, makes the product acceptable to the patient.

Q. 14. To what extent is the bitter taste of the quinine masked in his preparation?

A. Almost completely.

Q. 15. What do you mean by facilitating absorption?

A. The preparation being in liquid form is easier assimilated by the organs, because naturally the product before absorption must be in such form in the digestive organs.

11 Q. 16. You would say it hastens assimilation by the organs?

A. I would.

Q. 17. That it assimilates more quickly than if the same amount of quinine were given in the shape of a pill?

A. It would.

Q. 18. What other, if any, principal ingredients are there in this "Quin-Coco?"

A. Yerba santa, vannilin, saccharin, and cocoa, and a syrup base.

Q. 19. Cocoa in a syrup base?

A. Yes, sir.

Q. 20. Explain that to the Court. What is meant by "syrup" in the drug business?

A. A mixture of sugar and water.

Q. 21. What part does the yerba santa play in this mixture?

A. To disguise the bitter taste of the quinine.

Q. 22. State whether or not the cocoa has the effect of disguising the bitter taste of the quinine?

A. It has.

Q. 23. What about the syrup and vannalin?

A. The syrup is used as a sweetener of the preparation, and is commonly used in medicine for such purposes. The vannalin is added as a flavor and to emphasize the flavor of the cocoa.

Q. 24. But in quite small proportions?

A. Vannalin is used in small proportions.

Q. 25. Have you made any personal experiments in order to demonstrate whether or not cocoa has any effect in masking the bitter taste of the quinine?

A. I have. I have made a sample of a mixture with a syrup base, using the same proportion of quinine as we use in "Quin-Coco" and without any other ingredients. I made another sample, using a syrup of cocoa as a base, and having the same quantity of quinine sulphate, and without any other ingredients *of* flavors. Upon

12 tasting these, I found the one with a cocoa base was markedly less bitter than the one without the cocoa.

Q. 26. You made those experiments yourself?

A. I made these experiments personally. I placed some of the two preparations I made in the bottles, which I produced.

(The bottles produced by the witness are offered in evidence and marked "Pfeiffer Experiment No. 1" and "Pfeiffer Experiment No. 2.")

Q. 27. Can you state what other qualities the cocoa imparts to the combination in "Quin-Coco" in respect of flavor and the fluidity of the mixture and so forth?

A. Besides assisting in masking the bitter taste of quinine sulphate, the cocoa acts as a thickener of the mixture, and has the property of holding the undissolved quinine sulphate in suspension. It also makes the product opaque in this way, hiding the fact that the quinine sulphate is not dissolved. Further, it gives the preparation a chocolate flavor and taste. It also is important in preventing precipitation or settling of the quinine sulphate to the bottom of the bottle, thus enabling the making of a preparation which is pharmaceutically satisfactory.

Q. 28. What is the nature of the preparation in regard to its fluidity and touch, if you choose?

A. It is a thick and rather viscid mixture.

Q. 29. Will you state whether cocoa, that is to say, chocolate, using the broader term, is a popular flavor, and how popular?

A. It is a popular flavor, and is probably the most used flavor of any single flavor.

Q. 30. Will you state whether or not the particles of quinine sulphate are in solution in Quin-Coco.

A. They are almost entirely undissolved.

Q. 31. What would be the relation of the solution of the quinine sulphate in this preparation and its bitterness?

13 A. If the quinine sulphate was all in solution, the preparation would have a bitter taste.

Q. 32. Does undissolved quinine exist in a crystalline form?

A. Usually.

Q. 33. Does it so exist in this preparation?

A. It does, as I have tested it under the microscope.

Q. 34. Explain a little bit more fully what is the advantage of an opaque drug?

A. The advantage of an opaque mixture is limited to those mixtures which have not the ingredients in complete solution. This is to overcome the objection which patients have to taking muddy mixtures or mixtures with precipitates in the bottom, and the opaqueness tends to hide the undissolved ingredients and precipitates, giving the product a more appetizing appearance.

Q. 35. Dr. Francis, one of the plaintiff's witnesses, testified, in his opinion, in substance, that in "Coco-Quinine" the quinine sulphate was in solution. What have you to say about this?

A. Dr. Francis is mistaken.

Q. 36. Give your reason.

A. Almost all the quinine is undissolved and held in suspension.

Q. 37. You have now mentioned certain effects of cocoa in this mixture. Please state your opinion as to how far the cocoa is essential to the preparation, and whether any other ingredient could replace it, in your opinion?

A. I could not make the preparation without it, and I know of no other ingredient which could be used in its stead.

Q. 38. Upon what do you base those statements?

A. On experiments made.

Q. 39. State whether or not you have ever known or seen a

14 liquid mixture which satisfactorily disguised or masked the taste of the quinine without the use of chocolate or cocoa?

A. I have not.

Q. 40. State the difference between chocolate and cocoa.

A. Cocoa is chocolate with most of the cocoa butter pressed out.

Q. 41. Usually and commercially does some of the butter remain in the cocoa?

A. It does.

Q. 42. What becames of the cocoa butter taken out of the chocolate?

A. It is sold as a commercial product.

Q. 43. Under that name?

A. Under the name of cocoa butter.

Q. 44. Why do you prefer to use cocoa instead of chocolate in your "Quin-Coco"?

A. Chocolate contains an excess amount of butter fat which would separate upon standing or in shaking and in shipping goods from maker to user.

Q. 45. What similarity in therapeutic effect, in your opinion, is there between your "Quin-Coco" and Lilly's "Coco-Quinine"?

A. I would say they were similar.

Q. 46. What is the usual unit of a dose of quinine?

A. This varies, but a two grain dose is the more popular.

Q. 47. And in multiples of two?

A. In repeated doses.

Q. 48. In respect of the thickness of the mixture, do you know whether there is any difference between these two preparations.

A. From actual experience, no. I have been told that "Quin-Coco" was the thinner.

Q. 49. When the Pfeiffer Chemical Company first put out its "Quin-Coco" in the fall of 1906, state whether or not it was listed in your catalogue and given to your salesmen to sell over the country?

15 A. It was listed in the catalogue of the Pfeiffer Chemical Company, and the preparation was announced to the travellers, they were advised to accept orders for "Quin-Coco." At that time we employed about thirty-three travellers.

Q. 50. From what sources did the demand prior to 1906 for a liquid preparation of this sort come?

A. It came from the retail drug trade and from dispensing doctors.

Q. 51. What are "dispensing doctors," and how general is the practice?

A. As generally understood, a dispensing doctor is a doctor who carries and dispenses a preparation direct to the patient as against the prescribing doctor writing the prescription and sending the patient to the drug store to obtain the medicine. The practice of dispensing medicines has grown very materially in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually when

a doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

Q. 54. What influence has the increase or diminution of malaria as a disease throughout the county upon the demand for quinine products?

A. Quinine being a popular treatment for malaria, naturally its use would increase and decrease in accordance as malaria increased and decreased.

Q. 55. Can you give any opinion as to whether malaria has increased or decreased in the last ten years?

16 A. I have travelled some in the south. I have noticed improved drainage, and from observations I would say that malaria has decreased. I know in the State of Iowa when I was a boy there was a great deal of malaria and at present there is none whatever.

Q. 56. About what percentage of your sales are direct to retailers and dispensing doctors?

A. Seventy-five per cent.

Q. 57. How does Warner & Company sell their goods?

A. We employ a large force of travelers. At present we have between 75 and 80. These travelers regularly call on the retail drug trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products. We also sample our products in response to requests from the trade and as suggested by our travelers and from time to time we sample largely direct from mailing lists which we purchase from circularizing companies.

Q. 58. You mean you distribute samples in containers, bottles or other containers, is that the idea?

A. Yes. The samples are finished in accordance with the nature of the product. If a liquid it is in a bottle, if a tablet it may be either in a bottle or a box, and if a powder in paper; if an ointment, in a tin can.

Q. 59. Do you advertise in the medical drug trade journals?

A. Not at present.

Q. 60. Do you advertise in newspapers?

A. Not the pharmaceutical lines, which covers products of the William R. Warner Company and the Searle & Hereth Company.

Q. 61. How much of the United States do these salesmen cover, how often do they call upon substantially all of the druggists and dispensing doctors in their territory?

17 A. Our aim is to cover the entire United States and our travelers call on the dispensing doctors and druggists from one to six times a year, this in accordance with the territory assigned them.

Q. 62. What was the expense of maintaining this force of salesmen in 1914?

A. Between $250,000 and $255,000.

Q. 63. Of what are your sales of Quin-Coco the result?

A. They are the result of demand for a preparation containing quinine sulphate with the taste disguised, and the result of sampling

we have done with this product and of our efforts in selling the product.

Q. 64. I understand that the retail druggists, the wholesale druggists, sometimes called jobbers, and the dispensing doctors, all buy direct from you?

A. That is correct.

Q. 65. Has the plaintiff a definite method of selling his products which is different from yours, and if so, what is it?

A. As it is generally understood in the trade, Lilly confines the sale of his products through the jobbing drug channel. He employs salesmen to solicit orders from retail druggists and dispensing doctors. The orders from the dispensing doctors are usually filled through the retail drug trade, the orders from the retail druggists being filled through the jobbing drug trade. I don't know whether or not Lilly makes any exception to this general policy, nor what they are. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers, shipping and filling the purchase direct to the purchaser, whether he be a retail druggist, dispensing doctor, or jobber.

Q. 66. Do you know whether the plaintiff solicits or details any dispensing doctors?

A. I understand that he does.

Q. 67. What does "detail" mean in this connection?

A. To demonstrate your preparation, to the physician, either with or without a sample.

18 Q. 68. Are there other drug manufacturing houses who have other methods of sale than those two methods you have just mentioned?

A. Yes, there are some firms who sell only to the retail drug trade; some firms who sell only to dispensing doctors.

Q. 69. Then I understand that your method reaches all classes of purchasers who wish to buy your preparations, whereas the Lilly method and the other methods you have mentioned are limited to a class of purchasers as direct customers?

A. That is correct.

Q. 70. Referring to pint bottle of your product, Quin-Coco, is that and was it when you adopted it a stock bottle in common use?

A. It was.

Q. 71. Both as to color and shape?

A. It was.

Q. 72. What do you know about the word "Lilly" painted in red on Lilly preparations?

A. All the Lilly products that I have seen bear the word "Lilly" in red ink.

Q. 73. In script type?

A. Yes.

Mr. Rawle offers in evidence copy of the trade mark "Lilly" marked "Defendant's Exhibit, Lilly trade-mark."

Q. 74. What is meant in this business by "specialty?"

A. "Specialty" as usually used, means a product introduced by

the firm marketing the same. Oftentimes the word has a broader meaning and includes preparations to which the manufacturer has given a special name or special dress.

Q. 75. May it be a secret or an open formula?

A. It may be either.

Q. 76. Which is it usually?

19 A. When specialties were first introduced they were almost entirely secret. Of recent years, however, quite a number of them have open formulas. I am unable to state which is the larger proportion.

Q. 77. Does your house put out a number of specialties?

A. We do.

Q. 78. Does the Lilly house put out any specialties of the same or similar preparations put out subsequently to your putting out your corresponding specialty?

A. They do.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

Q. 79. Can you furnish a list of such?

Same objection.

A. I can furnish a list of preparations of specialties of various firms, including those of William R. Warner & Company and the Searle & Hereth Company, giving the name of the Warner, Searle & Hereth and the manufacturers' preparation and the corresponding preparation marketed by Eli Lilly & Company and first marketed by Eli Lilly & Company subsequent to the marketing of the product by the manufacturer who markets the original specialty. In making out this list I have used the Lilly Company's 1913-14 catalogue. The tabular statement which I produce, contains in the first column the name of the article as originally and first introduced; and in the second column the name of the original introducer, and in the third column the name of the product as subsequently introduced by the Lilly Company, with the page in the Lilly catalogue.

Q. 80. To make the matter clear, is it correct to say, taking an instance, that William R. Warner & Company originally introduced Syrup of Tolu and Heroin, and that at a subsequent date the

20 Lilly Company introduced Syrup of Tolu Comp. and that the two preparations are pharmaceutically similar?

Same objection.

A. That is correct.

Q. 81. What can you say as to whether the various Lilly products on column 3 of this list are pharmaceutically similar to the corresponding production of the original house on the first column of your list?

Same objection.

A. Many of them are.

Q. 82. Name some which you think are?

Same objection.

A. Calomel and bismuth powder, Lilly, is similar both in physical appearance and formula to Calalactose, S. & H. Digestive Comp. powder, Lilly, is similar both in physical appearance and therapeutic action to Compound Digestive Powder, S. & H.; Elixir Salicylic Acid Comp., Lilly, is similar to Elixir Salicylic Comp., Warner. Guaiacol Comp., Lilly, is similar to Guaiatonic, S. & H. Elixir Lactated Pepsin, Lilly, is similar to Lacto-Peptine, New York Pharm. Co. Eucalyptus Thymol Antiseptic, Lilly, is similar to Listerine, Lambert Pharm Co. Tritici, Lilly, is similar to Tritica, S. & H.

Q. 83. State whether or not, in answering above that many of the articles in the third column are similar to those in the first column, you mean that there is no similarity between the others and them?

Same objection.

A. The similarity between the product exists both as regards their therapeutic action and their physical appearance. Some of these products have similar therapeutic action, but vary in physical appearance, while others are similar both therapeutically and physically.

21 Q. 84. State whether or not the items in the third column are such as to be in competition with the corresponding article in the first column.

Same objection.

A. They are.

Q. 85. State whether or not the articles in the third column are such that they could be used with practically the same effect interchangeably with the corresponding article in the first column?

Same objection.

A. Yes.

Mr. Rawle offers in evidence the list produced by the witness, which is marked "Defendant's Exhibit, G. A. Pfeiffer's list of Lilly products."

Mr. Bradford: The offer and exhibit is objected to for the same reasons as stated in the objection to the testimony based thereon.

Q. 86. In the drug business as a whole, and the vast amount of drugs and preparations which we all know of and see in the druggists', can you give an estimate of about how many items are being more or less sold in this country?

A. I would be unable to make any accurate statement, but 125,000 different kinds would be far below the actual number.

Q. 87. Can you classify these in a large sense?

A. They can be divided in chemicals, of which Warner lists practically none; in patent medicines, of which Warner lists practically none; in pharmaceuticals, which embody practically all the Warner

line. Pharmaceuticals may be subdivided into specialties and miscellaneous preparations, of which Warner lists several hundred; into fluid extracts, of which Warner lists over 400; into tablets, of
22 which Warner lists over 1,200; elixirs, of which Warner lists over 200; syrups, of which Warner lists over 50; tinctures, of which Warner lists over 25; capsules, of which Warner lists 6 or 8, besides, several other minor subdivisions.

Mr. Bradford: The last two questions and answers are objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

Q. 88. To what extent are there preparations of the various drug houses which could be used interchangeably without the doctor or the user knowing it?

Same objection.

A. There are quite a few thousand.

Q. 89. To what extent are these interchangeable drugs and preparations put on the market by a number of different drug houses?

Same objection.

A. They are marketed by practically all pharmaceutical and chemical firms, chemical manufacturers.

Q. 90. When you say that they are interchangeable, what have you to say as to whether or not the patient, getting one or the other, would know the difference?

Same objection.

A. He could not know the difference.

Q. 91. Then, if a prescription mentioned one of these interchangeable drugs, it could be filled by the druggist, so far as the patient is concerned, by the use of any of the interchangeable drugs of a number of houses?

Same objection.

A. It could.

Q. 92. If the prescription specified one of these interchangeable drugs, but named the maker, what would be the duty of the druggist?

A. To supply the make or brand specified.

Q. 93. To what extent are drug stores stocked with these
23 interchangeable drugs of the make or brand of several different houses—do they carry the makes of several houses?

Same objection.

A. Very often they do.

Q. 94. In filling or not filling a doctor's prescription, specifying a particular drug, upon whose honesty does the matter depend?

A. Upon the party who fills the prescription.

Q. 95. You were in the retail drug business for a number of years

and in the manufacturing drug business for many years; can you state what is considered to be the ethics on this subject?

A. To fill the prescription exactly as written.

Q. 96. How far, in your experience, is this understood among the druggists and the officials to be the ethics of the drug business?

A. Universally.

Q. 97. What, in this code of ethics, is thought of the druggist who, without informing the prescription writer, fills a prescription with a drug other than the one mentioned therein?

A. He is considered dishonest.

Q. 98. From your experience in the retail drug business and manufacturing drug business, to what extent do you think that this ethical code, which you have mentioned, prevails, and is recognized as followed by the retail druggists?

A. I personally have never known of any one substituting one article when another article was specified on prescription. I further feel that it is generally known and understood that the relation of the retail druggist is confidential, both toward the prescriber and the patient. In filling the prescription the dispenser can infer the ailment of the patient, and he has no right to divulge information which he obtained through this confidential relation. In addition, it is the dispenser's duty to carefully examine the prescription to discover any possible errors of the prescriber. Especially is this true in the case of poisons, to discover and correct any possibility of over-doses. Further, he has no right to use an article in place of the one specified. Doing so brands him as being dishonest, violating a confidence, and committing a reprehensible act. As regards our firm, we have never authorized or suggested any one to use any products we make in place of the product specified. In all our instructions to the travellers, this point is not only discussed, but emphasized. Further, we point out the objections to such a practice. We consider it not only unethical, but a violation of confidence on the part of the dispenser.

24

Q. 99. What is your opinion, based upon all these years of experience, of the morals of the retail druggist?

A. As a whole, I consider them very high—above the average of the ordinary commercial man.

Q. 100. How far do you consider the drug business properly carried on is fundamentally based upon the personal honesty of the retail druggists in the country?

A. Almost entirely so.

Q. 101. I hand you "Complainant's Exhibit, Document No. 3." Please state what this list contains in respect of Warner's products?

A. Over 90 per cent of the products we make are competitive. Most of these are listed under the same names, while others, although alike therapeutically and in formula, have names different from the competitors' product. This list contains a majority of this second class of items. Some of the products are similar physically, while all of them are similar from the standpoint of the formula and therapeutic effect. This refers to the articles listed opposite each other in the first and second columns. None of the preparations in the second

column are similar in dress and make-up to the articles in the
25 first column, and many of them are very much different in physical appearances, character and so forth. The purpose of that list was for the convenience of our pricing department, of our salesmen, of our druggists and doctors' customers, and to enable them to find preparations similar to each other. In this respect it might be termed a finding list. In a sense, we considered this list as a supplement to our catalogue. We distributed the same to our travellers, to dispensing doctors, and we have heard of travellers of competitors carrying the same.

Q. 102. Are there items in this list which were first put out by any one of your houses and afterwards a similar article was put out by some other house?

Mr. Bradford: I object to that question as immaterial, irrelevant and incompetent.

A. There are.

Q. 103. Are there any preparations made up from the United States Pharmacopœ-a or the National Formulary on this list?

A. Not any that I know of under the same name, except I notice at least one which is listed in the United States Pharmacopœ-a, Syrup of Hypophosphates, Comp., which I think is a U. S. P. product. There may be others, but I would be unable to identify them without referring to the U. S. P. and the National Formulary.

Q. 104. Does this list contain, to any extent, or any large extent, your fluid extracts, tinctures, elixirs, syrups, pills and tablets?

A. It does not.

Q. 105. About how many such do you put out similar to the like products of other houses?

A. 2,000 or more.

Q. 106. How far do the other houses in respect of those preparations put out a like or greater number?

A. It varies, but I would say it averages about the same, with all the prominent drug manufacturers.

At one o'clock P. M. a recess was taken until two o'clock P. M.

26 (After Recess.)

Q. 107. What are "line pharmaceuticals"?

A. They are a list of pharmaceuticals which are marketed by different firms under the same name and are subdivided in fluid extracts, elixirs, tablets, tinctures and syrups, wines, pills and several other subdivisions.

Q. 108. They are entirely similar pharmaceutically and are all marketed under the same name substantially?

A. Practically.

Q. 109. They are all similar pharmaceutically, though made by different houses, and are practically marketed under the same name?

A. Yes. But under the manufacturer's individual label.

Q. 110. Before the Lilly Company marketed its Coco-Quinine product, say about 1900, was there a demand in the trade for quinine sulphate with the taste of the quinine masked, and if so, how was that demand met by the drug trade?

A. There has always been a desire to mask the bitter taste of quinine, and this demand was filled by supplying coated pills and tablets, by elixirs, by marketing special syrups of quinine. Some of these, however, did not contain quinine sulphate, but contained the less bitter alkaloids of cinchona bark, which alkaloids have similar therapeutic action. To illustrate, quinine tannate, quinidine alkaloid, cinchonidine alkaloid; also the retail druggist often disguises the bitter taste of quinine by dispensing it at the soda fountain in soda water, such as coffee flavor and chocolate flavor, chocolate soda, and the quinine sulphate was also disguised in powders by being prescribed mixed with powdered chocolate and sugar. In addition there were vehicles on the market for disguising the bitter taste of quinine.

These were intended for extemporaneous preparation—that
27 is, the mixture was made at the time the prescription was written or the product was sold or the dose taken.

Q. 111. State whether or not other drug manufacturing houses have within the last fifteen years put on the market and sold chocolate or cocoa and quinine mixtures similar to Quin-Coco?

A. They have. There are quite a number of such preparations on the market and have been for a great many years.

Mr. Bradford: The question and answer objected to unless the witness antedates the complainant's product.

The Witness: Some of these were on the market before Quin-Coco was marketed.

Q. 112. Please produce samples of such products that have been on the market as you say for some years?

A. I produce the following, giving the name of the product, together with the name of the respective makers:

"Syrup Quinine, with Chocolate;" H. K. Mulford Co., Philadelphia;

"Wampole's Chocolate Quinine," Henry K. Wampole Company, Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Company, Dallas, Texas;

"Koquin," John T. Milliken & Co., St. Louis, Mo.

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Mayer Bros. Drug Company, St. Louis, Mo.;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," the Harvey Company, Saratoga Springs, New York;

"Chocolate Syrup of Quinine," the William A. Webster Company, Memphis, Tenn.;

28 "Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.;

"Choquin," William S. Merrell Chemical Company, Cincinnati.

Mr. Bradford: The question and answer and offer of exhibits I object to as irrelevant and not competent to prove any issue in this cause.

Q. 113. Are there others?
A. There are.

Mr. Rawle: I will produce others when received.

Q. 114. What knowledge have you as to the original date at about which any of these products were put on the market?
A. I know that several of these products were on the market prior to the time when Quin-Coco was first marketed. Among these are Syrup of Quinine with Chocolate, H. K. Mulford & Company; Wampole's Chocolate Quinine, Henry K. Wampole & Company, Philadelphia. I am unable to state the exact date of marketing of the others. Some of them were marketed either just before or at about the same time Quin-Coco was first marketed.

Mr. Rawle: I will produce evidence as to dates later on.
Mr. Bradford: The last question and answer are objected to for the reasons previously given.

Q. 115. Can you state from an inspection of the labels of these respective bottles just offered how far the contents are respectively a similar preparation to Coco-Quinine or Quin-Coco?

Same objection.

A. The quinine content of the preparations varies to some extent; but, as a whole, the quinine content is about the same as that of Coco-Quinine, Lilly, and Quin-Coco, S. & H.

29 Q. 116. Do they all contain chocolate or cocoa as an ingredient?

Same objection.

A. They do.
Q. 117. State whether or not these various preparations you have just introduced are in competition and have been for some years on the market with Coco-Quinine, and more or less extensively offered for sale and listed?

Same objection.

A. They have.
Q. 118. What have you to say as to the business standing of the drug houses putting out these products?

Same objection.

A. They all have the reputation in the trade as being reliable houses. Some of them have a national reputation, while a certain few do an international business as well. Among the latter are H. K. Mulford & Company, of Philadelphia, and H. K. Wampole & Company, of Philadelphia, who have an international reputation.
Q. 119. I think you said that the Lilly Company especially de-

tails—that is to say, solicits the business of—prescription doctors, and that you did not; is that correct?

A. That is not quite correct. Prescription doctors have no business to solicit. They are prescribers and not purchasers of medicinal products, as a rule.

Q. 120. I did not mean to ask you whether the Lilly Company solicited the business of the prescribing doctors. I merely meant to ask whether the Lilly Company "details" the prescription doctors?

A. They do.

Q. 121. And your company does not?

A. We do to a limited extent.

Q. 122. And by "detail," do you mean that a salesman
30 visits a prescription doctor and talks about all the merits of a particular drug and hopes to induce him to prescribe it?

A. That is correct.

Q. 123. What effect on the druggists, as to carrying a particular make of goods, does this detailing work among the prescribing doctors have?

A. It creates a demand for that special product.

Q. 124. What do the druggists then do?

A. Supply the demand.

Q. 125. That is, they thereupon keep it in stock?

A. They stock the item and supply the demand.

Q. 126. In this way—that it, by the action of the prescribing doctors of the kind I have mentioned—is that particular product so detailed more fully brought to the attention of the drug stores?

A. Yes.

Q. 127. Please state among what classes of customers your market lies?

A. Among the dispensing doctors, retail druggists and jobbers.

Q. 128. How many doctors are there in the United States, and how many of them are dispensing doctors?

A. They are over 130,000 doctors. I have previously stated that, in my opinion, about 50 per cent. are dispensing doctors. This would mean over 65,000 dispensing doctors. I have before me the classified list of professions and trades in the United States, published by the Howe Addressing Company, of Philadelphia—the issues of September, 1915, which gives the number of the physicians by states, with an aggregate number of 137,760.

Counsel stipulates that the Howe list produced by the witness may go into the record as being a list of physicians in the United States classified by states, and that the list is published by a responsible house in Philadelphia, and bears the inscription on the front page as follows:

31 "Howe mailing lists guaranteed 99 per cent correct." "The Howe Company agrees to furnish a list of all doctors in the United States by states with their respective addresses."

Q. 129. What proportion of your output is sold to dispensing doctors?

A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations.

Q. 130. You have said that you had a market with retail druggists throughout the country. Upon what calls, either by prescription or over the counter, could a retail druggist dispense your product other than for the direct call of Quin-Coco?

Mr. Bradford: That is objected to as calling for the witness' opinion, and not for any evidence of value in determining questions at issue.

The Witness: As an ex-retail druggist, this could be dispensed on calls for a cough syrup, especially those with grippy tendencies. It could be dispensed upon calls for a sweet syrup of quinine. It could be dispensed upon calls for a tasteless quinine. It could be dispensed upon calls for a chocolate quinine. It could be recommended by the druggists in cases of coughs, colds and malarial conditions, such as chills and fever. A retail druggist could in many ways dispose of this product other than for calls for either Coco-Quinine, Quin-coco, or even chocolate syrup of quinine.

Q. 131. What about calls for a dose of quinine?

A. The retail druggist could point out the advantage of taking quinine in a preparation that disguises the taste, and especially would this be true if it was difficult for the patient to take pills or tablets, or the patient was nauseated by the bitter taste of quinine.

Q. 132. Have you referred to calls for Quin-Coco as one of the occasions on which a druggist might sell it?

32 A. I have not, but I assumed, of course, that he could sell it on such calls.

Q. 133. Can you state the aggregate sales in dollars of Quin-Coco during the past year or any period?

A. I am unable to give any accurate statement of this because we do not keep a record of such sales in our statistical department; but, judging from the amount made, the sales in 1914 were over $12,000 and less than $13,500.

Q. 134. What have you to say as to druggists recommending Quin-Coco to their doctors and asking them to prescribe it?

A. That is quite a common practice. Druggists very often stock a product which is similar to a nationally advertised or a nationally detailed product, and in a sense act as "detailers" for the manufacturer of the competitive product, interviewing the doctors and requesting them to write prescriptions for the competitive preparation.

Q. 135. Is that considered proper practice on the part of the druggist?

A It is.

Q. 136. How far, in your opinion, as experienced in a retail drug business, can a druggist, by personal effort, increase the sale of any product or products?

A. A retail druggist can sell almost any product he chooses, and in fact create a demand for such products. This has been and is being done continually. There are some firms in the trade who

market products almost the entire sale of which depends upon the druggist's recommendation and interest in those products. Some of these firms are national in their scope, and have sales in excess of a million dollars each. Oftentimes customers come into the store asking the druggist's opinion as to the product they should use. In many communities, or in some communities, the druggist is looked upon as possessing more or less ability in this direction, and is often called "Doc" or doctor. This is especially true in the Southern states, where it is common practice to call a druggist "Doc."

Q. 137. How about orders from jobbers?

A. We have received orders for Quin-Coco from a great many jobbers, almost all of which were unsolicited.

Q. 138. What proportion of the jobbers in the country would this cover?

A. I am unable to state accurately, but I should judge about one-third of all the jobbers.

Q. 139. What about mail orders?

A. We have received mail orders for Quin-Coco continuously. From an examination of the orders which I have made casually from time to time, I should judge the orders for Quin-Coco average, with those for our other products, everything considered.

Mr. Rawle offers in evidence the Howe Addressing publication referred to above, giving the list of retail druggists in the United States, classified by states, as 53,773.

Q. 140. Does that fairly represent your own estimate of the number of druggists in the United States?

A. That is more retail druggists than I thought there were. I thought it was between 43,000 and 46,000.

Q. 141. What is it that has brought about your sales of Quin-Coco?

A. First, a demand for a chocolate mixture containing quinine sulphate and disguising its bitter taste.

Second, efforts we have made to create a demand, this through samples and through our usual business efforts to increase and extend our business.

Third, through efforts of the retail druggists in inducing doctors to use and inducing consumers to buy Quin-Coco.

Fourth, from the dispensing doctors, from whom we solicit direct, and who use Quin-Coco, in their practice, dispensing it in those cases where they feel such a product is indicated.

Fifth, We have received orders from the jobbers, who in turn supply the retail druggists and dispensing doctors. We also expect our sales organization, which we continue at a large expense, to extend and increase the sale of all our products, including Quin-Coco. These salesmen, in addition to soliciting orders from the retail drug trade and dispensing doctors, also use their spare time in detailing and calling upon the prescribing physicians.

Q. 142. Do they spend their spare time in detailing the prescribing physicians, or is it on the entire line of items carried by you?

A. No, that is impossible. The preparations detailed vary with the salesmen and with the territory.

Q. 143. Will you please state to what extent your salesmen, before they are put to work, are instructed by the officers of the company or others, in the performance of their duties as salesmen?

A. They are given what we consider a good training and a demonstration of our products and policies. Personally I have done a great deal of this work, and did it entirely during the absence of Mr. H. Pfeiffer, who in the last five years has been away traveling perhaps more than half the time. The usual practice is to have the salesman come to the house and have him spend a little time in each of the departments, to acquaint him with the various lines we supply. He is given a set of catalogues to study, and before leaving for the territory, I always made it a point to personally review his visit and go over the matter of selling with him. I deemed this work so important that I had made an outline of the different points I would take up with the salesman. These points cover and review all his work in the department, a review of his contract and territory, a review of our policies regarding our different lines, and a review of our policies regarding other lines, also requirements of a successful traveler. Under this heading I discussed character, industry, knowledge of human nature, knowledge of business, knowledge of goods, knowledge of prices, and particularly dwelt upon character as the best asset which not only a traveler but which any individual could possess. I also pointed out the need of his help, loyalty and co-operation to increase his firm's success. Under the point of policy, regarding our products, I pointed out our relations with our competitors and impressed upon him the disadvantages of making any false statements or soliciting any orders under false promises. I also talked about the question of substitution and pointed out to him that this was dishonest, no matter who did it, bringing out the point that the drug business was rightly ethical, that confidence must exist, that health and life depended thereon. I also reviewed our salesmen's "Confidential and Manual," and our list giving quantity, prices and special offers. This list was not generally distributed to the trade, but was used by our pricing and selling department. It contained nothing secret, and some of these lists were distributed among our competitors. In this salesmen's "Confidential and Manual" we have a section "What a Salesman Should Know." This is in numbered paragraphs. Paragraph 16 reads that "It pays to adhere strictly to the truth at all times."

Paragraph 17 reads that "It don't pay to speak ill or even mention your competitor".

There are other paragraphs. From the last page of this manual I quote the following:

"Our policy in dealing with the trade is briefly stated.

"1. We believe in honesty and fair dealing.

"2. To supply the best quality of products.

"3. To sell goods as low as possible consistent with quality.

"4. To ship orders promptly.

36 "5. To fill orders complete.
"6. To never speak ill of a competitor.
"7. To accord courteous treatment."

Knowing the tendency of the salesman to make promises and statements in his desire to get an order, we would emphasize the need of restraint in this regard, and impress upon him as strongly as we can the need of honesty and fair dealing in his relations with the trade. We impressed upon him also that he is the firm's representative and the house or his firm is judged by him. If he makes a false statement or uses unfair methods, the house is judged in that light.

Q. 144. How far back was this manual in use?

A. The oldest copy which we have on file containing the matter quoted is dated 1911. I don't know whether previous copies contain this matter or not, as we have none on file. Each salesman is supplied with one of these "Confidentials". I would add also that my connection with the selling department is limited to salesmen who work in the territory handled by the Philadelphia office. For convenience our sales organization is divided, part being handled by the Philadelphia office and the other part being handled by the St. Louis office.

Q. 145. Have you any older written matter from which you taught the salesmen?

A. Yes, I have a little vest pocket memorandum which I use in connection with this outline, in fact reference to this booklet is made on the outline, so that I would not overlook reviewing this also. This vest pocket memorandum contains other points to take up with the salesmen, among which are salesmen's expenses, salesmen's sundry points, mailing orders promptly, never talking about competitors. I quote the language of one clause on page 14, reading as follows:

"Never talk about your competitors."

This booklet has other points, such as the disadvantage of
37 talking dull times and discouraging the buyer, and so forth.

I have carried this booklet for over eight years, had it in my possession before coming to Philadelphia, which was in June, 1908.

Q. 146. In thus instructing your salesmen before sending them out on the road, you are instructing them as I understand, to take out a line of many thousands of items. How many thousands are there?

A. Over 5,000.

Q. 147. Have you ever had any information or knowledge except from the plaintiff's testimony in this case of a retail druggist selling or dispensing your product, Quin-Coco, on a physician's prescription or on a call over the counter when Eli Lilly & Company's product, Coco-Quinine was called for or specified?

A. Never.

Q. 148. Have you ever, directly or indirectly, authorized any retail druggist to do so, or in any way whatever suggested to any retail druggist that he could do so?

A. Never.

Q. 149. Have you ever had any information or knowledge except from the testimony in this case that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or an a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 150. Have you ever in any way, directly or indirectly, directed, authorized or suggested to any one of your salesmen, that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically prescribed or called for?

A. I never have.

38 Q. 151. I think you said that the earliest Quin-Coco was put out in August, 1906, and that the defendant company had nothing to do with that product until August, 1908?

A. That is correct.

Q. 152. What can you say as to whether the plaintiff company had knowledge that that product, Quin-Coco, was on the market?

A. I am unable to state as to what knowledge they had of Quin-Coco being on the market, when first marketed, but sometime in September, 1909, I received a letter from Mr. Lilly, on the subject of Quin-Coco. I produce his letter, dated August 31st, 1909, which is in the following words:

8-31-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

Presuming upon our very pleasant acquaintance, I am going to put a proposition before you in the matter of Coco-Quinine. You are possibly aware that this preparation was entirely original with our house. This fact was fully recognized by our competitors with whom we hold pleasant relations. Mulford and Pfeiffer are the only ones who are making a preparation of the same nature. While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion.

Very truly yours,

(Signed) J. K. LILLY.

39 Mr. Rawle calls on plaintiff's counsel for letter from G. A. Pfeiffer, to J. K. Lilly, dated September 23rd, 1909.

Mr. Bradford: Counsel for complainant states that he has not the letter called for, but that he has requested the officers of the plaintiff corporation to furnish it and search of their files has failed to discover it.

Q. 153. Please produce your copy of your reply to the last mentioned letter?

A. I produce a copy. It is as follows:

Wm. R. Warner & Co.,
Philadelphia, Pa.,
639 N. Broad St.

September 23rd, 1909.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.,
Indianapolis, Ind.

DEAR SIR:

Mr. H. Pfeiffer has returned and we have conferred with him concerning your letter of 8-31-09, referring to Coco-Quinine. In reply would state that we would almost prefer to discontinue supplying Quin-Coco rather than raise the price, not because we could not sell some of the goods at the advanced price, but because we know the tenor of the retail trade, and their objection to manufacturers' raising the price of a specialty, after he has induced them to stock, and frankly, we do not care to court the ill will of the trade.

In reference to discontinuing this preparation, we admit that Coco-Quinine was entirely original with your house, but we also make this claim for preparations Warner and The Searle and Hereth Co. market. To illustrate, we claim originality of Elixir Salicylic Comp., Tinct. Digitalis, Fat Free Tritica, Pils. Cascara Cathartic (Dr. Hinkle), and we beg to inquire whether you and the other members of the Homilia Club would agree to discontinue
40 or raise your price on preparations similar to the above mentioned and other specialties, which we can prove were originally introduced by us. We would not be satisfied to have you agree to do this, but we would expect the other manufacturers to accord us the same treatment as they accord you on Coco-Quinine.

The writer feels the matter is of sufficient importance for a personal interview, for there are many positions which could be taken, among which is the fact that possibly you are deriving as much benefit by our pushing and selling Quin-Coco as you are suffering loss, for does not the fact that several houses are pushing the same preparation, enlarge the market for said product? It is not always true that a monopoly of a certain preparation acts to the benefit of the owner. We are very unbiased in our position, and, of course,

would not think of replacing any new specialty you or any of our other friends place on the market, but really, we do not feel it is fair and just to go back of the returns, unless we shall profit by a condition which causes us a loss, provided we are entitled to said profit.

Respectfully yours, ——— ———.

Q. 154. Can you produce any other letters from the plaintiff or from Mr. J. K. Lilly?

A. Yes, I have another letter dwelling upon the same subject, dated October 6, 1909, signed J. K. Lilly, and a letter dated January 11th, 1910, from J. K. Lilly, which is not signed by him, but identified as his letter by a printed slip bearing the name of J. K. Lilly pinned to the original letter when received. They are as follows:

Mr. G. A. Pfeiffer. 10-6-09.

MY DEAR MR. PFEIFFER:

I must confess to a degree of disappointment in the tenor of your letter under date of September 23, which arrived during my absence in the East.

41 Coco-Quinine was so entirely original with us and such a radical departure in the way of Quinine preparations that we have felt we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices.

It is beyond our power to meet the conditions outlined in your letter, for the reason that we cannot bind other manufacturers but it seems to me that there is an excellent opportunity for our two houses to extend full consideration. After all, it's just a matter between us and of course if this is your last word we will bow to your decision and have to be guided in the future by what we may consider our own best interests, although we much prefer to work together in a way that would serve the interests of both houses. If you can conceive of any way in which we could extend to you a consideration in return for making the same price that we do on Coco-Quinine, we will be very pleased to consider it. If not, then it is of course a closed chapter.

My observation has been that all of the houses profit by the proper consideration of others. If one gets out a specialty and puts money and effort behind it the others do not jump upon it like buccaneers; issue an imitation; cut the price and endeavor to profit by the efforts and expense of others. It seems to me that this is as it should be and if this principle is ignored everybody would be at everybody's throats and a very deplorable condition would result. This doesn't seem to be a sane proposition to me.

With best regards, I am,

Very truly yours,

(Sgd.) J. K. LILLY.

42

1-11-10.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

I venture once more to address you on the subject of your Quin-Coco and the price thereof. Your action in pushing this preparation is directly in violation of one of the fundamental principles of the Homilia Club. If this Club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor. Coco-Quinine was absolutely and unquestionably original with our house and has been so recognized by all members of the Homilia Club. Only one manufacturer up to the time of your entering the Club made a preparation of that nature and upon taking the subject up with them, they immediately desisted from pushing it, and their preparation has virtually disappeared from the market.

You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.

There is no parallel to this condition in the Homilia Club and we file with you our earnest protest against your action in this matter. If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles.

In making this request we are keeping well within the spirit and the wishes of the Homilia Club such as are being carried out
43 every day by the members thereof.

We trust that you will receive this letter in the spirit in which it is sent and give same your kind and early consideration.

Very truly yours,

——— ———.

Q. 155. I hand you a letter signed J. K. Lilly. Did you receive this at about the time it bears date, and is it from Mr. Lilly?
A. I did, and it is signed J. K. Lilly. It is in the following words:

"Josiah K. Lilly,
Indianapolis.

2-2-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

DEAR MR. PFEIFFER:

Under separate cover there is coming to you a Red Lilly Catalogue for the current year.

Trusting that you will accept it with my compliments and best wishes for a profitable year for your good house, I am,

Very truly yours,
(Signed) J. K. LILLY."

Mr. Bradford: The introduction of this letter is objected to as having no bearing on the subject matter of this suit.

Q. 156. There is a reference in this correspondence to the "Homilia Club." What was that?

A. That was a fraternal organization of some of the prominent drug manufacturers for the purpose of discussing and solving the difficulties, common to all. It was especially helpful when arranging to meet the requirements of the Pure Food and Drugs Act of 1906. This being a new act, the regulations and rules for enforcement were more or less vague and indefinite. It was also
44 used as a register of preparations marketed by the different firms. This registration was under two classes. Class A embraced preparations on which the manufacturer claimed use of name only. Class B embraced preparations on which the manufacturer claimed ownership of both name and formula or product.

A booklet of these names was issued and distributed among the members, a copy of which I produce. This is the second issue of this booklet.

Q. 157. Please look at this booklet and state whether you find any registration of Eli Lilly and Company products in it?

A. I do, on the first page there are products listed under both classes, class A and class B. There is a note at the bottom of the page reading as follows:

"Class A, name only.
"Class B, name and formula."

Q. 158. State if Lilly's Coco-Quinine is registered and classified there and in which class?

A. It is registered in class A.

Mr. Rawle offers the booklet of the Homilia Club produced by the witness in evidence and particularly the registrations therein of Eli Lilly & Company.

The booklet is marked "Defendant's Exhibit Homilia Registrations".

Q. 160. Can you give the members of the Homilia Club?

A. I can remember most of them at the time I was a member. They were as follows:

Ernest Stauffen, of Sharp & Doehme; George S. Merrell, William S. Merrell & Company; F. K. Strearns, of Frederick Stearns & Company; Stuart Wyeth, of John Wyeth & Bro.; Milton Campbell, of H. K. Mulford & Company; W. A. Sailer, John Wyeth & Bro.; E. G. Swift, of Parke, Davis & Company; E. H. Nelson, of Nelson, Baker & Company; J. K. Lilly, of Eli Lilly & Company;
45 G. A. Pfeiffer, of William R. Warner & Company.

Q. 161. Did you have any discussion with Mr. Lilly in regard to referring this subject to a meeting of the Homilia Club?

A. Mr. Lilly and I talked of this subject at one time personally, when we happened to meet at Atlantic City. I am unable to give any definite outline of the conversation. I had forgotten that this interview took place until some time ago. Mr. Lilly refreshed my memory and I remembered the fact that the interview was had, but not what was discussed other than Quin-Coco was discussed during the interview. There was correspondence passed between us regarding referring the matter to a meeting of the members of the Homilia Club.

Q. 162. Then what did you do?

A. Before the next meeting of the Homilia Club I resigned from the Club.

Q. 163. What were your reasons for resigning?

A. There were several reasons. One was the question of salesmen, and the other was the question of Quin-Coco; and after conferring with the other members of the firm we decided that it would be advisable that I resign.

Q. 164. What was the "salesmen" reason?

A. One of the questions which the Homilia Club endeavored to regulate was the hiring of salesmen of the firms represented in the club by other members of the club. The plan was no house should approach a salesman of the other firm and should not hire this salesman until laying the matter before the firm employing the salesman.

Q. 165. You objected to this?

A. We did.

Q. 166. Why?

A. We did not like it and we did not think it was fair to the salesman.

Direct examination closed.

46 Cross-examination:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 167. What reply did you make to the letter of January 11th, 1910, from Mr. J. K. Lilly?

A. I have a copy of my reply dated January 14th, 1910, reading as follows:

"Mr. J. K. Lilly,
c-o Eli Lilly & Company,
Indianapolis, Ind.

MY DEAR MR. LILLY:

Your letter of 12-1-10 received, and after being considered by the different members of the firm will be answered.

Respectfully yours."

——— ———.

X Q. 168. What further answer did you make?

A. I have the copy of my reply dated January 25th, 1910:

"Mr. J. K. Lilly.

DEAR MR. LILLY:

After further consideration of your letter of 1-11-10, we have decided that the subject is of too much importance to adjust through correspondence, and will be very glad to go over the matter with you in person some time when you are in the East, and when you can find it convenient to call at the office. Should the writer go West prior to your coming East, he will stop off at Indianapolis. The reason for this plan is our fear that correspondence might lead to unnecessary arguments.

Respectfully yours,

——— ———.

X Q. 169. Did any conference follow this letter of January 25th, 1910, and if so with whom and where?

A. I do not remember any.

47 X Q. 170. When was the conversation with Mr. Lilly at Atlantic City,—before or subsequent to this correspondence?

A. My recollection is that it was before any of it, before all of it.

X Q. 171. Did you have any correspondence with Mr. Lynn on this subject?

A. I don't remember.

X Q. 172. Did you have any conference with Mr. Lynn on this subject?

A. I do not remember any special conference. Mr. Lynn and I might have talked the matter over after the adjournment of the meeting of the Homilia Club of New York City. That is the extent of my recollection, and what was said at that time I could not say.

X Q. 173. I hand you a copy of letter dated February 14th, 1910, and ask you if that recalls any facts to your mind, and to state what the letter is, if you recognize it?

A. This is a letter dated February 14th, 1910, addressed to Mr. C. B. Lynn, reading as follows:

"DEAR MR. LYNN:

Subject: Coco-Quinine.

After further consideration, we feel it preferable that you register the complaint you have against us with all members of the Homilia Club and we will reply thereto. We consider your position raises an issue upon which each of the members of the Homilia Club should pass judgment.

Very respectfully yours."

——— ———.

I would conclude that that is a letter I wrote Mr. Lynn.
X Q. 174. Who is the Mr. Lynn to whom your letter is addressed?
A. Mr. Lynn, General Manager of Eli Lilly & Company.

By Mr. Rawle:

X Q. 175. Here present?
A. Here present.

48 By Mr. Bradford:

X Q. 176. I hand you copy of another letter dated March 7th, 1910, and ask you if you recognize it and if you will read it into the record and state what it is?

A. This letter is dated March 7th, 1910, and it is addressed to Mr. J. K. Lilly, Indianapolis, Ind. Immediately above Mr. Lilly's name are the following names: Ernest Stauffen, George S. Merrell, F. K. Stearns, Stuart Wyeth, Milton Campbell, W. A. Sailer, E. G. Swift, E. H. Nelson. The letter reads as follows:

"DEAR MR. LILLY:

I am today forwarding my resignation to Mr. Nelson, Secretary of the Homilia Club. This action is due to the fact that the firm I represent cannot meet your requirements on Quin-Coco, and for the further reason that when accepting membership, the writer was under the impression that preparations which were on the market prior to the formation of the club were not covered by the resolution adopted on new Specialties. This position we feel is confirmed by the minutes of the Homilia Club, and knowing that the Homilia Club was and continues to be a benefit to the members, rather than cause it any friction, the firm deem it advisable that I resign.

Very cordially yours,

G. A. PFEIFFER."

P. S.—Copy of this letter has been mailed to all the members of the Homilia Club."

X Q. 177. What was the substance of the resolution referred to in this letter relating to new specialties?

A. I have no definite memory as to the verbiage but the thought, as I recollect it, was that the Homilia Club would not discuss the question of priority of rights in a product which had been marketed prior to the formation of the Homilia Club.

X Q. 178. Did not this also cover the matter of registration with the club?

49 A. Perhaps it did. I could not state positively.

X Q. 179. Assuming that it did, would not this be a reason why Coco-Quinine could not be registered with that club in Class B by Eli Lilly & Company at that time?

Mr. Rawle: I object to the question as based upon an assumption and because the minutes of the Homilia Club are the best evidence, and because the witness has stated that he has no definite recollection of the verbiage of the minutes.

The Witness: That would depend upon the wording of the specific clause. It might have such an effect.

X Q. 180. Is it not true that you find in this exhibit list, products registered in Class A by other houses, the exclusive right to which products was and has been freely acknowledged by all manufacturers?

Mr. Rawle: That is objected to because the registrations of other houses are irrelevant and because the registration in the Homilia list by Eli Lilly & Company of Coco-Quinine claims only the right to the name "Coco-Quinine" and to nothing else.

Mr. Bradford: Counsel's last assumption is probably based upon a misunderstanding of the rules of the club as defined in the resolution the witness is testifying concerning.

The Witness: Yes, that is true. I find Adrenolin preparations registered in Class A by Parke Davis & Company. I know, however, that this product is protected by trade-mark and formula patent. No other firm could, if they chose, make or market this preparation.

X 180. Is it not true that except for the resolution to which you have referred, Parke Davis & Company might have registered these products in Class B?

50 Mr. Rawle: That is objected to because the language of the resolution is not testified to and because the act of Parke Davis in registering its product has nothing to do with the registration of Coco-Quinine by Eli Lilly & Company, which speaks for itself, independently of the registration of any other product of any other house.

The Witness: Parke Davis & Company could of course have registered their product under any class they saw fit, it being their own product?

X Q. 181. It was not a new product, at that time, was it?

Same objection.

A. I do not know. I do not know when they first marketed it.

X Q. 182. Do you have in your possession a copy of the Homilia Club resolution which was referred to in your letter of March 7, 1910?

A. I have turned all my papers over to my counsel, and I will look it up and if I find it I will produce it.

Adjourned until Friday morning, Nov. 26th, 1915, at 9.30.

Continuation of Depositions at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Friday, November 26th, 1915, at 9.30 a. m.

Present: Parties as before noted.

G. A. PFEIFFER.

Cross-examination resumed.

By Mr. Bradford:

X Q. 183. Have you found the Homilia Club resolution which was referred to just prior to adjournment Wednesday?

51 Mr. Rawle: That is objected to because it does not sufficiently appear that these are the authentic records of the Homilia Club.

The Witness: I found what purported to be copies of the minutes and am unable to find in these the specific resolution covering a division of products in Class A and Class B. There are references to classification of products in Class A and Class B in these minutes, but I was unable to find the resolution specifically covering this subject.

X Q. 184. Your letter of March 7, 1910, to Mr. Lilly correctly states your understanding of the rules of the club as to this matter, I assume?

Mr. Rawle: That is objected to because the rules of the club must speak for themselves when the authoritative copy of the rule is proved, and because the witness' understanding of the rules is not relevant or admissible, and because the rule is not in itself admissible evidence, but only what the plaintiff did under the rule.

The Witness: The letter expresses an understanding which I then had and which I now have regarding specialties. It does not fully express our reasons for resigning, inasmuch as the question of "salesmen" affected all members of the Homilia Club, while the question of Quin-Coco affected Eli Lilly & Company alone and we did not feel it advisable to start a correspondence regarding the other question with the other members.

X Q. 185. On Wednesday I asked you if you remembered any conference with Mr. Lynn, General Manager of Eli Lilly & Company on this subject, and at that time you were unable to remember any except possibly a reference to it following a meeting of the Homilia Club in New York City. I ask if you have thought the matter over

since, and if so, if you have recalled any other conference with Mr. Lynn on this subject?

52 A. I have not thought the matter over especially, but without refreshing my memory, I cannot state of any other conference. I might answer that that I stopped off at Indianapolis visiting the firm of Eli Lilly & Company once upon my way to St. Louis, but at that time I do not remember of the subject of Quin-Coco or Coco-Quinine being mentioned. Neither do I know the time of this visit.

X Q. 186. From your direct testimony I understood that you are a registered pharmacist. I would like to inquire if you are also a graduate of a school of pharmacy?

A. I took one term in the Illinois College of Pharmacy, Chicago, Illinois, but did not graduate.

X Q. 187. As a pharmacist, do I understand you to say that there are no other syrups except chocolate or cocoa capable of holding the crystals of quinine sulphate in suspension?

A. No, I would not say that, but I would say that there is none that I know of which has the other advantages of chocolate in this preparation.

X Q. 188. These other advantages include, as I understood your direct testimony, a palatable taste?

A. That is one.

X Q. 189. This taste is calculated to make the product popular?

A. It helps.

X Q. 190. What therapeutic advantage has the chocolate or cocoa in this preparation, if any?

A. As regards the actual therapeutic action of quinine it has none, but as regards aiding in making a palatable preparation, it aids in bringing out the full therapeutic action of the quinine, which in some other mixtures might be retarded.

X Q. 191. In what other mixtures for example?

A. In a mixture where the appearance of the product was not appetizing or in a mixture that was not so acceptable to the stomach.

53 X Q. 192. What mixture, for example, would not be so acceptable to the stomach?

A. A mixture which was distasteful to the patient.

X Q. 193. Won't you be a little more specific and suggest some mixture that would be distasteful to the patient?

A. One with a flavor or taste, color or appearance which would be nauseating or objectionable to the patient.

X Q. 194. In the samples of preparations introduced as "Pfeiffer Experiment No. 1 and No. 2," I understand that there is no yerba santa in either?

A. No yerba santa in either of them?

X Q. 195. So far as pertains to quinine as masked in either preparation, the masking is effected then solely by the syrup used, that is in the one case by the "simple" syrup and in the other case by the chocolate syrup?

A. By the chocolate syrup, no other flavors or other ingredients of any kind. One is a mixture of a simple syrup and quinine.

The other is a mixture of cocoa and quinine, with the same proportion of cocoa and same proportion of quinine as in Quin-Coco.

X Q. 196. The sample containing cocoa also contains a simple syrup, does it not?

A. Sugar is the base of the syrup of cocoa.

X Q. 197. Are there any other syrups than chocolate or cocoa having the advantages of making a liquid preparation opaque?

A. There might be. I know of none I could mention.

X Q. 198. How about maple or licorice?

A. Licorice, unless I am mistaken, is soluble and will give the preparation a dark color, while cocoa is insoluble and its effect on the preparation is different on account of this difference in character. Maple I have not had any experience with and do not know.

X Q. 199. Is it not common practice in the preparation of liquid medicines, to color them with simple coloring ingredients for
54 the purpose of making them opaque?

A. I never heard of an ingredient added to a liquid preparation for color only which was not soluble in the liquid preparation.

X Q. 200. You spoke of Quin-Coco being brought out by Pfeiffer Chemical Company in response to a demand for a preparation of this character. Will you explain more fully the nature of these demands?

A. They were requests we received from the trade for such a product.

X Q. 201. Did these requests come to you personally and if so from whom were they received?

A. They may have, but on account of the length of time since the product was marketed, I would be unable to state specifically.

X Q. 202. Do you remember of seeing any letters containing such requests?

A. I do not remember.

X Q. 203. Do you remember having any conversation with any of your traveling men on this subject?

A. I do not.

X Q. 204. You do not recall any statements made to you by any of your traveling men in reference to a demand in the trade for a preparation to sell in the place of the Eli Lilly & Company preparation, Coco-Quinine?

A. I do not. I might add that I personally keep a folder in which requests, verbal or written, for additions to our line, are filed. I go over this folder with the other members of the firm, also with our salesmen, and after the decision has been made, all the material is destroyed, so any requests or statements which have been received have long since been destroyed. I always talk over with our travelers when seeing them the question of new preparations. If the question of Quin-Coco was discussed, it was discussed with our travelers just as I discuss the advisability of marketing or adding other new
55 products. Sometimes when in doubt about adding a new preparation we submit the matter to our salesmen for a vote. Whether or not this was done with Quin-Coco I don't remember.

X Q. 205. Please state fully what was done in the fall of 1906 by the Pfeiffer Chemical Company in bringing out the preparation which you call Quin-Coco?

Mr. Rawle: That is objected to as not affecting the rights of this defendant.

The Witness: I would be unable to answer that question for the reason that at that time I was in Chicago in charge of the Searle & Hereth Laboratories.

X Q. 206. Who had charge of the work of bringing out this preparation for the Pfeiffer Chemical Company in the fall of 1906?

Mr. Rawle: The same objection is made.

The Witness: Being away from the laboratory I could not state.

X Q. 207. Was any of the preparation made and sold during the fall of 1906?

A. From personal knowledge I could not state.

X Q. 208. When was this preparation first considered in marketable form and placed upon the market by your concern?

Mr. Rawle: That is objected to unless it refers to the defendant.

The Witness: I think it was in the fall of 1906, but I am unable to state positively. It may have been a little prior to the fall or it may have been towards the latter part of the year.

X Q. 209. Was any considerable quantity of this preparation made either during 1906 or 1907 and sold by your concern?

A. I can only answer that by comparison, by stating that there was less sold then than we sell now.

56 X Q. 210. What concern first introduced to the trade a liquid preparation of quinine sulphate colored and flavored with cocoa?

A. My understanding is that the firm that first introduced it and detailed it in a large way was Eli Lilly and Company.

X Q. 211. The preparation which they marketed under the name of Coco-Quinine?

A. Yes.

X Q. 212. Was or was not the Eli Lilly & Company preparation one that was popular in the trade in 1906?

A. I would say that Coco-Quinine was known by the trade, but I could not say as to the extent of its popularity.

X Q. 213. Do I understand from your direct testimony that Quin-Coco is not manufactured in the Philadelphia laboratories of William R. Warner & Company?

A. Yes. That would require the explanation that the Searle & Hereth Company share with the William R. Warner & Company the building occupied by William R. Warner & Company.

X Q. 214. What is the relationship between the Searle & Hereth Company and the William R. Warner & Company?

A. William R. Warner & Company, is distributor for the products of the Searle & Hereth Company.

X Q. 215. What is the distinction as to the ownership between the two corporations?

A. The Searle & Hereth Company is a corporation of the State of Illinois. William R. Warner & Company is a corporation of the State of Pennsylvania.

X Q. 216. Are not both corporations owned by the identical persons?

A. They are not.

X Q. 217. In what respect do the ownerships differ?

A. William R. Warner, Jr., owns an interest, a substantial
57 interest, in William R. Warner & Company, and has no interest whatever in the firm of the Searle & Hereth Company.

X Q. 218. What is the relationship between the Pfeiffer Chemical Company and the Searle & Hereth Company on the one hand and William R. Warner & Company on the other?

A. The Pfeiffer Chemical Company is a corporation incorporated in the State of Missouri, the stockholders of which are different than either those of the Searle & Hereth Company or those of William R. Warner & Company.

X Q. 219. Is it not true that the controlling interest in each corporation is owned by the same individuals?

A. It is.

X Q. 220. Is it not true that Searle & Hereth Company except in name has no active existence, but the preparations sold under its labels are manufactured in the chemical laboratories of the Pfeiffer Chemical Company in St. Louis and the laboratories of William R. Warner & Company in Philadelphia?

A. No. The Searle & Hereth Company has a legal existence, makes its reports to the State, reports the income tax covering its profits to the national government and fanufactures its own products.

X Q. 221. But has no independent laboratories?

A. It has independent laboratories, just as much as William R. Warner & Company and the Pfeiffer Chemical Company.

X Q. 222. Where are the laboratories of the Searle & Hereth Company located?

A. St Louis, Missouri, and Philadelphia, Pa.

X Q. 223. What is the difference in the identity of the Searle & Hereth Company laboratories in Philadelphia and the laboratories of the William R. Warner & Company in Philadelphia?

A. They are in the same building?

X Q. 224. Are they not identical?

A. They are together.

58 X Q. 225. Is there any difference watever?

A. Yes. Each firm's products are made from each firm's formula, each preparation is made as an individual entity.

X Q. 226. Do not the same chemists and employees conduct the operations of the different concerns, the same laboratories?

A. Yes.

X Q. 227. Is not the same thing true of the laboratories in St. Louis?

A. Yes.

X Q. 228. Do you regard Quin-Coco as a Searle & Hereth formula?

A. Yes. It is so filed in our formula binders.

X Q. 229. When did you acquire the Searle & Hereth Company?

A. June, 1906.

X Q. 230. Did you find Quin-Coco formula among the Searle & Hereth formulas?

A. No, and there are other formulas now put out under the Searle & Hereth which were not in the Searle & Hereth formulas at that time, new products which we have added since 1906.

X Q. 231. May I inquire why the Searle & Hereth label is used for the Quin-Coco product instead of the label or the Preiffer Chemical Company, which I understand originally brought it out?

A. The reason was that when the Searle & Hereth Company affiliated with the Pfeiffer Chemical Company, the Pfeiffer Chemical Company had marketed a line of pharmaceuticals. As they also manufactured a line of patent medicines, it was difficult to introduce the goods and the line was not at all popular. After the affiliation, the Searle & Hereth line of pharmaceuticals being established, the Pfeiffer Chemical Company line of pharmaceuticals was discontinued, and the leading items in the Pfeiffer Chemical Company line were remarketed under the Searle & Hereth label. That was the reason Quin-Coco was transferred.

59 X Q. 232. You regarded your ownership of the Searle & Hereth Company as giving you the right and privilege of adopting the Searle & Hereth label for any product you saw fit; is that not so?

A. Yes.

X Q. 233. You considered this practice your privilege in order to utilize the good-will of the Searle & Hereth Company you had purchased to your best advantage?

A. Yes.

X Q. 234. Were Searle & Hereth originators of a combination of calomel and bismuth?

A. I could not say that they were the first firm to ever mix calomel and bismuth, but they marketed and made popular a special combination of these two ingredients under the name Calolactose.

X Q. 235. Is it not true that so-called specialties of many concerns in many instances are substantially well known formulas, marketed under special names and made popular by special effort?

A. That is probably true to a certain degree. How common that practice is I would be unable to state.

X Q. 236. Referring to the blue list, "Plaintiff's Exhibit Document No. 3," are not many of the items on this list common prescription items?

A. Many of the preparations are prescribed and many sold in original packages and some both.

X Q. 237. I note on this list that you give the original product, the original manufacturer and the original manufacturer's price,

the prominent location on the circular. Was there any purpose in this?

A. That was necessity, because this information required more room inasmuch as it was unnecessary to state the manufacturer's name on our product.

X Q. 238. Why was it necessary to state the manufacturer's name and manufacturer's price as to the original product?

A. As a matter of information.

X Q. 239. You mentioned that your travelers use their
60 spare time, or some of it, in detailing special products to the physicians. Can you give any estimate as to the proportion of your travelers' time that can be so classified?

A. I would saw a small proportion of their time.

X Q. 240. What specialties do they detail?

A. That depends upon the traveler. Some travelers take a liking to one product and push that product. Others take a liking to a different product.

X Q. 241. The traveler is allowed to use his own judgment then?

A. Very largely. It is only done in his spare time and we feel he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm.

X Q. 242. What have you to say of your product Quinimel as a medium for masking the taste of quinine sulphate?

A. It is a good product. It is weak in that it does not hold the quinine in suspension. The quinine precipitates on standing.

X Q. 243. That is used more for extemporaneous combining, I presume; I mean for immediate administration?

A. Yes. The Quinimel is intended as a medium for extemporaneous preparation and for masking the taste of other bitter substances other than quinine also. Quinimel is a vehicle only, containing no quinine or other drug with definite therapeutic action.

X Q. 244. Your statement as to the value of your sales of Quin-Coco for the year 1914 I assume was made after inspection of your sales records and is as accurate as you can make it?

A. We do not keep a statistical record of Quin-Coco sales. This is based upon the laboratory records as to the amount made.

X Q. 245. What do your laboratory records as to the amount made show in gallons?

A. I could not state.

61 X Q. 246. Your laboratory records would show this, I presume?

A. Yes, with the explanation that we marketed this same product under another name, in proprietary formula, under the firm name of Preiffer Chemical Company, under the name of Dr. Hobson's Sweet Chocolate Quinine, and it would be impossible to state how much was marketed under the name of Quin-Coco, and how much under the name of Dr. Hobson's Sweet Chocolate Quinine.

X Q. 247. Do your figures refer to the product of St. Louis laboratories alone or the St. Louis laboratories combined with the Philadelphia laboratories?

A. Combined.

X Q. 248. How long has the preparation been on the market under the Dr. Hobson's label?

A. Several years. I could not state exactly how many.

X Q. 249. Do you keep a record sales of the Dr. Hobson's product?

A. We do not.

X Q. 250. In your testimony Wednesday, relative to your instructions to salesmen, you referred to a typewritten memorandum for the purpose of refreshing your memory. When was this typewritten memorandum prepared?

A. That memorandum was an evolution of points I had been taking up with the salesmen, this being the last list, and as near as I can remember, this was first adopted in the early part of 1914.

X Q. 251. Do physicians as a rule specify the make when prescribing items which are commonly referred to as "general line" items; I think you have used the term "general lines"; is not that correct?

A. I am really not any longer competent to testify as to present practice, but I feel the practice varies. Some do and some do not. Some consider, if it is a line item, any maker's product would be satisfactory. Others have a preference for a certain maker's
62 line, and specify. The various houses aim to encourage specification for their particular products.

X Q. 252. You have mentioned I think that propably one-third of the jobbers in the United States had sent you orders for this item, Quin-Coco. Can you state approximately the proportion of your sales of this one item that goes through the jobber's hands?

A. I could not say, but I would say a small proportion.

X Q. 253. One per cent?

A. I would say more than that as an opinion.

X Q. 254. You mentioned the fact that your house does not advertise in the medical journals. Is there any reason for this?

A. Our house formerly quite largely advertised in the medical journals. We discontinued doing so because we thought it did not pay.

X Q. 255. By "our house" do you mean William R. Warner & Company or Pfeiffer Chemical Company, or both?

A. William R. Warner & Company.

X Q. 256. Does the Pfeiffer Chemical Company advertise in the medical journals?

A. Never, to my knowledge.

X Q. 257. Have you ever advertised Quin-Coco in the medical journals?

A. Never, to my knowledge.

Redirect examination.

Mr. Rawle: I re-examine without waiving any objections.

By Mr. Rawle:

R. D. Q. 258. Referring to the typewritten pages you used yesterday to refresh your memory, about teaching your salesmen, you say

it is an evolution. How far back does it go in substance, that is how far back did you teach your salesmen along the lines indicated on these typewritten sheets?

63 A. This vest pocket memorandum which I have had over eight years was the beginning of making notes for conferring with the travelers.

R. D. Q. 259. And that has been gradually enlarged into the typewritten sheets?

A. It has.

R. D. Q. 260. How far has the teaching been the same, independently of whether you used that vest pocket book or the typewritten sheets?

A. The general policy has been the same.

R. D. Q. 261. As a matter of fact, is not the business of these affiliated corporations carried on entirely by yourself, your brother, Mr. H. Pfeiffer, both living in Philadelphia, and Mr. G. D. Merner, living in St. Louis?

A. We three have personal charge and control of the business of the several concerns.

R. D. Q. 262. What does "detailing" mean in respect of selling drugs to physicians, and is the term applied to dispensing doctors?

A. Detailing as commonly understood means demonstrating either by literature, samples, or personal visit to the physician. Detailing is done both to the prescribing and dispensing physician. It may also be done in a limited way to the druggist.

R. D. Q. 263. State whether or not it is usual and proper that salesmen selling competing goods should be informed as to competitor's prices for his goods?

A. This to a greater or less degree is almost necessary in order to meet the arguments of the buyer.

R. D. Q. 264. In this case chocolate and cocoa have often been used more or less interchangeably. State whether or not in current talk among laymen and even among those in the drug business, they are often used interchangeably, though not accurately?

A. They are.

R. D. Q. 265. When you became connected with William R. Warner & Company in 1908, was that corporation represented in the Homilia Club and by whom?

A. It was, by Mr. Frank M. Ramsay. Shortly after my
64 connection with William R. Warner & Company, Mr. Ramsay's services were discontinued, and I understand his membership in the Homilia Club was dropped or lapsed.

R. D. Q. 266. Soon afterward you were elected?

A. Later I was elected as a member.

R. D. Q. 267. While the membership of the club consisted of individuals and not of the corporation, they were employed by, and were in the club as representatives for their respective houses?

A. That was my understanding.

R. D. Q. 268. Do you happen to know whether Mr. Joshua K. Lilly was the Registrar of the club?

A. Yes, he was, at least for a time. I am informed that the Homi-

lia list, second issue, in evidence, was published at the offices and under the supervision of Mr. J. K. Lilly.

By Mr. Bradford:

R. D. Q. 26-. As Registrar of the club?
A. As Registrar of the Homilia Club.

By Mr. Rawle:

R. D. Q. 270. In the drug manufacturing business, state whether or not there is any more or less common practice of calling the attention of a competitor to trade derelictions on the part of one or more of that competitor's salesmen.

Mr. Bradford: Objected to as not re-direct examination, immaterial and irrelevant.

The Witness: It is done. How common the practice is I am unable to state.

R. D. Q. 271. Will you state whether or not anyone representing the Lilly Company ever complained to the defendant in respect to the matters here in controversy, as to an unfair method of selling Quin-Coco?

A. I have no recollection of ever receiving a letter or a complaint from Eli Lilly & Company regarding the acts or methods of
65 any one of our salesmen. I do remember of our St. Louis office at one time complaining to Eli Lilly & Company regarding the acts of one of their travelers, and my recollection is that the matter was amiably adjusted.

R. D. Q. 272. State whether or not in your opinion Quin-Coco S. & H. is inferior to the Lilly product of Coco-Quinine in stability or other qualities?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: We consider it equal in therapeutic action and a superior product from a pharmaceutical standpoint.

R. D. Q. 273. You have been asked whether you advertise your products and you replied that you did not. Can you state whether or not, for this reason, and for any other reason, the cost of selling goods for your house is lower than that of competitors?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: Not knowing the cost of selling of other firms, I do not know whether our cost of selling is less or more, but not spending any money in advertising in the medical journals, it is not necessary to add this to our selling cost. The selling cost as I use the term here includes both advertising and salesmen's expenses and other expenses for exploiting products.

R. D. Q. 273. Has it been your practice to employ head salesmen or salesmen having some supervision over the travelers?

A. Yes.

R. D. Q. 274. To what extent have such head salesmen had to do with the teaching travelers the proper method of selling goods?

A. To the extent of following our instructions as regards our policies and as regards posting the men on the various products.

66 R. D. Q. 275. And as to trade morals and as to morals of selling the goods?

A. Yes, that is part of our instructions.

R. D. Q. 276. State how far your instructions to your head salesmen were along the same lines as those to your travelers that you have testified to?

A. I often reviewed this list with the head travelers.

Recross-examination.

By Mr. Bradford, without waiving objections, as follows:

R. X Q. 278. As I understand it now, in addition to yourself, a "head salesman" taught your traveling men how to sell goods. Will you please explain a little more fully the methods employed by these head salesmen in teaching the travelers, I mean were their instructions wholly in the office or were these head salesmen put upon the road with the travelers and by example as well as by instruction authorized to teach your travelers?

A. The head salesmen worked with the regular salesmen both in the office and on the road. They sold goods with the regular traveler, often doing the selling themselves, leaving the regular salesmen watch their work, and then this would be reversed and the head salesmen would watch the regular salesmen work.

R. X Q. 279. Besides yourself, who else gave instructions to the head salesmen and also to the regular travelers?

A. Mr. Henry Pfeiffer, Philadelphia, Mr. G. D. Merner, St. Louis.

R. X Q. 280. Did these gentlemen also accompany salesmen on their trips?

A. Mr. Henry Pfeiffer years ago did this work. I don't remember of Mr. Merner ever working with the regular salesmen himself.

R. X Q. 281. Is it not a fact that Quin-Coco is as close a duplicate to Coco-Quinine as it is possible for your laboratories to make it?

67 A. We add nothing to Quin-Coco to make it like Coco-Quinine. Quin-Coco is the result of the ingredients all of which are necessary to the making of the product.

R. X Q. 282. By "the product" I assume you mean a product both in appearance and therapeutic action like Quin-Coco?

A. By "product" I mean Quin-Coco itself.

R. X Q. 283. Is not "detailing" usually considered important in the introduction of the new specialties?

A. Formerly it was considered the only method, but at present far less detailing is done. It is an efficient method of introducing a new product. However, the expense of personal detailing is so high as to, in many cases, make it unprofitable. I would say the practice of personal detailing with samples has diminished a great deal in recent years.

Mr. Rawle: Having just been able to procure copies of the third and fourth "Issues" of the registration list of the Homilia Club, following in sequence the second issue of the same club list offered in evidence yesterday, I now offer these two issues in evidence in respect of the registration therein of Coco-Quinine by Eli Lilly & Company in Class A and of "The Lilly Print" on the back of the cover, as indicating the printer of these two issues.

Mr. Bradford: The introduction of these lists is objected to except as a whole and for all the information they contain. If offered as exhibits as a whole for the information of the court no objection to their introduction is made, and it is admitted that they were published by the Registrar of the Homilia Club, Mr. J. K. Lilly, the President of the complainant corporation, and at complainant's publishing department.

The issues referred to are marked by the stenographer,
68 Defendant's Exhibit, Homilia Registration, numbers 2 and 3 respectively. GUSTAVUS A. PFEIFFER.

Deposition closed.

HENRY PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Please state your name, age, residence and occupation?

A. Henry Pfeiffer; age, 58 years old; residence, 6809 York Road, Philadelphia; occupation, manufacturing pharmaceuticals and patent medicines.

Q. 2. Have you ever been in the retail drug business; and if so, where, and how long?

A. I was in the retail drug business in Cedar Falls, Iowa, and for ten years about.

Q. 3. And after that?

A. After that went into the drug manufacturing business in St. Louis, in the firm of Allan Pfeiffer Chemical Company, nine years; then with the Pfeiffer Chemical Company and Searle & Hereth and William R. Warner. I am the President of William R. Warner & Company.

Q. 4. I understand that the business is controlled and managed by you and your brother, G. A. Pfeiffer and G. D. Merner entirely?

A. Yes.

Q. 5. What is your general department of the work, broadly speak*nig*?

A. I devote the most of my energy and time to the selling end, engaging salesmen, and training them, also in the financial and business ends.

Q. 6. Do you have considerable to do with training the travelers when they are first taken on?

69 A. Yes.

Q. 7. Also you have been absent in the last five or six years going around the world and traveling more or less, have you not?

A. I have been away from the business about the last five years, from one-half to two-thirds of my time.

Q. 8. What is your method of preparing the travelers to go out on the road and what line of instruction do you give them?

A. We give them samples and catalogues, "Salesmen's Confidential" and verbal instructions.

Q. 9. Have you any written rules which you impress upon them and have done so for some years; if so produce them?

A. I have a vest pocket memorandum which I have had for 13 or 14 years, this same book (producing memorandum book).

Q. 10. Have you taught the new travelers from that?

A. I have taken this up with them after they had been with us some time, after they had started out. I did not take this up with them at the time they started so much as I did after they were with us.

Q. 11. What rules or directions do you find in that vest pocket book, bearing on the question of how to deal with competitors' like products?

Mr. Bradford: Objected to unless the book is to be introduced as a whole.

Q. 12. Using this vest pocket book merely to refresh your memory, state what, if any, teaching you gave the travelers as to how to deal with competitors, as to talking about competitors' products?

A. Always taught them to let the other fellow alone, that we had all we could do to handle our own business.

Q. 13. Who do you mean by "the other fellow?"

A. The other competitors.

Q. 14. What do you mean by "letting alone?"

A. I mean not to waste their time talking about competi-
70 tors, but to put their entire efforts and energies on our samples, on our line that we manufacture and sell them.

Q. 15. How do you teach them with regard to a careful observance of trade morals and honesty in traveling for your house?

A. We always felt that our line gave us great possibilities, and if we got what we were entitled to we would be satisfied. It was not necessary to lie or misrepresent to get that business.

Q. 16. Did you take up with them the rules in the "Salesmen's Confidential" and discuss those?

A. Yes.

Q. 17. I hand you a copy of "Salesmen's Confidential and Manual," 1913–14, and call your attention to the 86th and 87th pages thereof. On page 86, notice rules 16 and 17, and on page 87 the seven rules indicating "Our Policy in Dealing with the Trade." Please look at those rules and state how far you took up those subjects in teaching your salesmen?

A. We constantly made an effort to keep our salesmen from talking too much about our competitors. We felt it was in our own line, that every knock was a boost, for the other fellow. That has been our policy, to keep from mentioning or recognizing the other people in our selling talk.

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Q. 18. Did you teach that policy to your salesmen?

A. That is what we talked to the salesmen.

Q. 19. Will you state whether or not it was strongly impressed upon them as the policy of the house?

A. It was so strongly impressed upon him that when we found a man that made statements he could not prove, we invariably called his attention to it, and if he did not change we would discharge him.

Q. 20. State whether or not your travelers were employed at the will of the house and could be discharged at any time?

A. All of our travelers were subject to discharge on written notice to the last named address.

71 Mr. Rawle: I offer in evidence the "Salesmen's Confidential and Manual" produced by the witness and particularly as to pages 86 and 87 thereof.

The book referred to is marked by the Stenographer, Defendant's Exhibit, Salesmen's Confidential.

Q. 21. Please read into the record Rules 16 and 17 and the seven clauses indicating your policy and also the seven lines on top of page 87?

A. On page 86 I read as follows:

"16. That it pays to adhere strictly to the truth at all times."

"17. That it don't pay to speak ill of or even mention your competitor."

On the top of page 87 I read:

"The Salesman's Creed.

"To respect my profession, my company and myself.

To be honest and fair with my company, as I expect my company to be honest and fair with me.

To think of it with loyalty, speak of it with praise, and act always as a trustworthy custodian of its good name.

To be a man whose word carries weight at my home office.

To be a booster, not a knocker; a pusher, not a kicker; a motor, not a clog."

At the bottom of page 87 I read:

"Our policy in dealing with the trade is briefly stated:

1. We believe in honesty and fair dealing.

2. To supply the best quality of products.

3. To sell goods as low as possible, consistent with quality.

4. To ship orders promptly.

72 5. To fill orders complete.

6. To never speak ill of a competitor.

7. To accord courteous treatment."

Q. 22. In your opinion, would one of your salesmen who suggested to a retail druggist that he should buy your product, Quin-Coco, and that he could supply it on prescriptions or on sales over the counter, when the Lilly product, Coco-Quinine, was called for, be an honest salesman?

A. No.

Q. 23. State whether or not you have ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 24. If you had had such information, that any salesman had done so, state whether or not that would have been contrary to his orders and your teaching and in violation of the selling rules of your house?

A. Yes, it would.

Q. 25. State whether or not you have ever in any way, directly or indirectly, directed, authorized, or suggested to any one of your salesmen that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

Q. 26. State whether or not you have ever, in any way, directly or indirectly authorized or suggested to any one of your head salesmen that he should or might suggest to any of your travelers that the traveler should or might suggest to any retail druggist that
73 he could dispense you product, Quin-Coco, on physician's prescriptions or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 27. State whether or not you have ever had any information or knowledge, except by the testimony in this case, of a retail druggist selling or dispensing your product, Quin-Coco, on physician's prescription or on a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 28. State whether or not you have ever, directly or indirectly, authorized any retail druggist to do so or in any way whatsoever suggested or represented to any retail druggist that he could do so?

A. I have not.

Q. 29. From your experience as a retail druggist and since, what is your opinion as to whether an energetic retail druggist can push the sale of a given product or preparation and create a market for it?

A. They can sell most anything they want to sell.

Q. 30. From your experience as a retail druggist, and since, what is your opinion as to the honesty of retail druggists as a class in the conduct of the drug business?

A. I consider them honest and reliable. I would say they are above the average.

Q. 31. Robert J. Groves, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 12. Will you please state in substance, as near as you can remember, what you would say to the druggist when you solicited his order for 'Quin-Coco,' using the language exactly as you would if talking to the druggist?

A. In calling on the druggist, if I found that he was a user of 'Coco-Quinine,' I used my best efforts to sell him 'Quin-
74 Coco,' pointing out to him that the product was equally as good as 'Coco-Quinine,' and cost him less money, and could be dispensed on prescriptions and sold over the counter as 'Coco-Quinine.'

Q. 13. On whose authority did you make such statements and representations to the druggists?

A. On the authority of William R. Warner & Company.

Q. 14. By whom were you given the instructions or authority in this matter?

A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer."

Please state whether or not you ever gave Robert J. Groves such instructions or authority?

A. I did not.

Q. 32. Lemuel B. Hardy, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 5. Please state what representations or statements you made to the druggists when you solicited their orders for 'Quin-Coco,' as near as you can remember?

A. I stated to the druggists that it was the same thing in color and contents as 'Coco-Quinine' with the exception that it flowed a little more freely, and that they could use it as a substitute for 'Coco-Quinine,' from the fact that it contained both quinine and cocoa, and the advantage they had in buying 'Quin-Coco' was the cheapness in price, cheaper than 'Coco-Quinine.' I demontsated to them also that it was the same color, and I have had them to taste of it to see that it was the same taste.

Q. 6. On whose authority did you make such statements when soliciting orders for 'Quin-Coco' from the retail druggists?

A. Well, I got authority from Mr. McNulty at one time I remember, and I am sure Mr. H. Preiffer instructed me on that, too."

75 Please state whether or not you gave Lemuel B. Hardy any such instructions or authority?

A. I did not.

Q. 33. C. J. Thurman, a witness called on behalf of the plaintiff in this case, testified as follows:

"Q. 7. Please explain the methods and arguments you employed in soliciting orders for 'Quin-Coco' and where you obtained your authority for such methods and arguments?

A. * * * We were also instructed by office managers, circular

letters to salesmen, etc., to push this 'Quin-Coco' as a substitute for 'Coco-Quinine', the same as per instructions from Mr. Garvin. This 'Quin-Coco' was one of the best selling specialties of the company.

Q. 8. Do you recall the names of any officers or men in authority from whom you obtained instruction or information relative to the sale of 'Quin-Coco' as a substitute for 'Coco-Quinine' other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner, who was manager of the St. Louis Company. Mr. H. Pfeiffer, who was president of the Pfeiffer Chemical Company, and has traveled with me on the road at numerous times. That is about all that I can recollect I got direct instructions from.

* * * * * * *

Q. 9. You spoke of Mr. H. Pfeiffer traveling with you or being with you on some of your trips. Was he with you on some of the trips when you pushed the sale of 'Quin-Coco'?

A. Yes, sir.

Q. 10. Did he participate with you in pushing this specialty?

A. The fact of the matter is that Mr. H. Pfeiffer knew very little about pharmaceuticals and he invariably left the selling of pharmaceuticals to me at the time he was with me, but his instructions
76 were always given to me privately. Mr. Pfeiffer never claimed to know anything about the pharmaceutical line, but he did a great deal of the selling of the Pfeiffer Chemical Company line while with me."

Please state whether or not you gave any instructions or information to C. J. Thurman, relative to the sale of Quin-Coco as a substitute for Coco-Quinine, and whether or not the statement that you did so, as made by that witness, is true?

A. I gave no instructions, and the statement is not true.

Q. 34. The same witness, C. J. Thurman, further testified as follows:

"Q. 12. Did your representations to the retail druggists include instructions to them as to how they could dispense it, and if so, what did you tell them on that point?

A. We were instructed by the Company to tell the trade that this preparation of 'Quin-Coco' could be used and dispensed on calls for 'Coco-Quinine'; and that it could be also used on prescriptions for 'Coco-Quinine' without the knowledge of the physician or the patient, as the preparation of 'Quin-Coco' was exactly the same as 'Coco-Quinine'."

Please state whether or not you ever gave such instructions to this salesman, C. J. Thurman?

A. I did not.

Q. 35. The same witness, C. J. Thurman, testified as follows:

"Q. 81. When did Garwin give you instructions? Was it when you started in 1903?

A. Well, it was a little later than they began putting out this lis probably 1905.

Q. 82. And was that the time Merner talked with you?

77 A. Yes, and later on.

Q. 83. How much later?

A. Well, up to the time that I left the employ of the Company December, 1912.

Q. 84. What did he say to you?

A. Well, his instructions to us were about the same as M Garwin's; that these preparations were exact substitutes for th original preparations named by the other companies. He also in structed us that 'Quin-Coco' could be used on doctor's prescription where 'Coco-Quinine' was specified, and for us to show the druggi how much he could save by buying this substitute and replacer pr paration from our company, and that there was no use of a druggi paying the price for these original preparations when he could bu something that would answer all purposes and save him quite little money.

Q. 85. Anything else?

A. No.

Q. 86. What did Mr. H. Pfeiffer say to you?

A. Well, his instructions were practically the same as were give by Mr. Garwin and Mr. Merner, although Mr. H. Pfeiffer has been o the territory with me a great many times and possibly has said mor than Mr. Merner in regard to pushing these different preparation substitutions and replacers."

Please state whether or not you gave such instructions to Mr. C J. Thurman as a traveling salesman?

A. I did not.

Q. 36. What would have been the policy of your company in re gard to C. J. Thurman as a salesman if you had learned that he ha pursued such methods in pushing the sale of that product, Quin Coco?

A. We would have reprimanded him and requested him to sto making such statements, and, if continued, would have discharge him.

78 Q. 37. Did you ever have any knowledge of Thurman making such statements?

A. No, sir.

Q. 38. Did he ever make such in your presence when you were traveling together?

A. No.

At 1:15 o'clock p. m. a recess was taken until 2:15 o'clock p. m.

2.15 p. m.

Present: Parties as before noted.

Mr. Rawle: The direct examination is closed.

Cross-examination.

By Mr. Bradford:

X Q. 39. As I understand your direct testimony, the concerns known as William R. Warner & Company, the Pfeiffer Chemical Company and the Searle & Hereth Company are controlled by yourself, Mr. G. A. Pfeiffer and Mr. G. D. Merner, and that this control is in all directions, that is, the manufacturing and selling and other directions?

A. The officers are not the same of the different companies. We manufacture under working arrangements with one another. The stockholders are different, and they are separate and distinct live corporations.

X Q. 40. That does not answer my question. I understood you to tell Mr. Rawle that the three companies named are all controlled by the same people?

A. Yes, the business is managed by us three.

X Q. 41. It is also controlled by you three, is it not?

A. I don't know about that. There are some mighty big 79 stockholders beside ourselves in this business.

X Q. 42. As a matter of fact, don't you three gentlemen own the majority of the stock of each of the three corporations?

A. Yes.

X Q. 43. I assume that the same policy prevails in the management of the business of the several corporations. Is this true?

A. Not necessarily, no.

X Q. 44. If it is not true in what particular is it not true?

A. Well, I cannot give you any specific answer on that. I mean, I could not at this moment say any particular item where it does not come in.

X Q. 45. The salesman representing one concern also represent the other concerns, do they not?

A. Yes, sir.

X Q. 46. The instructions to your salesmen are alike for the several concerns?

A. I would not say that, no.

X Q. 47. What would you say in respect to that?

A. My answer would be, I have not any specific instance in mind, but I would not say that our instructions were the same to our men on one proposition as it would be on the others, because we have got some conflicting propositions.

X Q. 48. The same traveling men handle the same line of products, do they not, that is, the products sold under the labels of the various concerns named?

A. No, they do not. Not all of them.

X Q. 49. Do you have traveling men whose lines are confined to products of William R. Warner & Company?

A. No.

X Q. 50. Do you have traveling men whose line is confined to the products of the Pfeiffer Chemical Company?

A. Well, I will say, in the first instance, that when yo
80 spoke—what are the three companies you have in mind now
X Q. 51. My questions have been directed to William R Warner Company, the Pfeiffer Chemical Company and Searle & Hereth Company; I have not included the numerous other concern affiliated with your organization, although I do not object to you making your answer as general and comprehensive as you wish.
A. That last question that I answered, what was that questio and the answer?

(The stenographer read the following question and answer:

"Q. Do you have traveling men whose lines are confined to prod ucts of William R. Warner & Company?
A. No.")

The Witness: That is correct.

X Q. 52. Have you any further answer to make?
A. What was the question and answer before that?

(The stenographer read the following question and answer:

"Q. The same traveling men handle the same line of products do they not, that is, the products under the labels of the various con cerns named?
A. No, they do not. Not all of them.")

The Witness: That is correct.

X Q. 53. How many traveling men have you handling the sale of the Warner line and the Pfeiffer line and the Searle & Hereth line combined?
A. I cannot say,
X Q. 54. Have you any?
A. We have.
X Q. 55. Who are they?
A. One is Charles C. Besore.
X Q. 56. What territory does he cover?
81 A. He covers the City of Philadelphia.
X Q. 57. Which line does he not carry?
A. He does not carry the Pfeiffer line.
X Q. 58. Do you think of any others?
A. I have none in mind now.
X Q. 59. My only purpose in asking you the original question was to find out whether or not in your general instructions to salesmen they are the same regardless of the line of goods carried?
A. I would say the "Salesmen's Confidential" applies to all sales men excepting such items that they do not handle.
X Q. 60. Please explain your methods in teaching or instructing salesmen who are to represent your concerns on the road?
A. Well, we give them a sample case, we give them catalogues, we give them the "Salesmen's Confidential," and make personal

visits to them, and try to speed them up on such items where they have not produced a satisfactory business.

X Q. 61. Do you ever have or have you ever traveled with any of these salesmen?

A. I have.

X Q. 62. Did you ever make trips with Mr. C. J. Thurman?

A. I have.

X Q. 63. In what territory?

A. In Nebraska.

X Q. 64. Any other territory?

A. I do not recollect any other.

X Q. 65. Were you ever with Mr. Thurman when he sold Quin-Coco to a retail druggist?

A. I do not recollect that I was.

X Q. 66. Did you ever have any talk with Mr. C. J. Thurman relative to Quin-Coco?

A. Not to my knowledge.

X Q. 67. You never mentioned it to him?

A. Well, I do not recollect of ever mentioning it to him.

82 X Q. 68. Did you ever talk to him about Coco-Quinine?

A. Not that I know of.

X Q. 69. Do you recall the names of any retail drug stores in Nebraska that you visited in company with Mr. Thurman?

A. I do not.

X Q. 70. How long ago was this?

A. Well, I would say six or seven years ago. Maybe longer.

X Q. 71. What other salesmen have you made trips with?

A. I have not visited any of them for a number of years.

X Q. 72. Do you recall the names of any that you have taken trips with on the road for the purpose of instructing them in their duties?

A. No, I do not positively.

X Q. 73. Did you ever make a trip with Mr. Groves?

A. No, I never did.

X Q. 74. Did you talk with Mr. Groves on the subject of Quin-Coco?

A. Not that I recollect of.

X Q. 75. Did you ever talk with Mr. Groves on the subject of Coco-Quinine?

A. Not that I know of.

X Q. 76. Did you ever talk with any of your salesmen on the subject of Quin-Coco?

A. I would be unable to give any specific case.

X Q. 77. Do you remember talking with any of your salesmen with reference to Coco-Quinine?

A. I do not.

X Q. 78. Do you remember Mr. L. B. Hardy?

A. I do.

X Q. 79. Were you well acquainted with him?

A. I knew him, yes.

X Q. 80. Did you ever make any trips with him?

A. I have.

83 X Q. 81. Was the subject of Quin-Coco ever broached between you and Mr. Hardy?

A. I cannot recollect that it was.

X Q. 82. Or the subject of Coco-Quinine?

A. I cannot recollect.

X Q. 83. Who was the man in your concern who first proposed to bring out Quin-Coco?

A. I don't know.

X Q. 84. Were not you the man?

A. I do not recollect.

X Q. 85. Was not the first work of preparation of Quin-Coco done at your direction?

A. I cannot say.

X Q. 86. Was it not done by your direction?

A. I cannot say.

X Q. 87. And was it not done for the express purpose of producing an article to take the place of Coco-Quinine Lilly and sell in the place of it?

A. I would say not.

X Q. 88. Do you remember when the manufacture of Quin-Coco was begun?

A. I do not.

X Q. 89. Do you remember of demands ever coming in to your house for an article to sell as a substitute for Coco-Quinine?

Mr. Rawle: I object to that question, implying that such demands did come in, in the terms in which counsel has put his question.

A. I do not.

X Q. 90. Do you remember that any demands ever did come to your house for a liquid preparation of quinine sulphate embodying cocoa or chocolate?

A. I do not.

X Q. 91. Do you know why your article Quin-Coco was brought out and put on the market?

A. I expect it was because there was a demand for such an article.

X Q. 92. Where did you travel with the salesman Hardy?

84 A. Somewhere in the south.

X Q. 93. You do not recall the territory?

A. I do not.

X Q. 94. When did you first hear of a liquid preparation of quinine sulphate flavored and colored with chocolate or cocoa?

A. I cannot say.

X Q. 95. Who first introduced such a preparation to the medical profession, so far as you know?

A. I don't know.

X Q. 96. Did you ever hear of Eli Lilly & Company's preparation called Coco-Quinine?

A. I have.

X Q. 97. Did you ever hear of it prior to 1906?

A. I could not say.

X Q. 98. Prior to 1906 you were quite familiar with drugs and medicinal preparations, were you not?

A. I was familiar with drugs and medicinal preparations.

X Q. 99. Were not you spending considerable time during that period visiting the drug trade?

A. I was.

X Q. 100. Was not a considerable part of your traveling in the interests of your house, in the southern section of the country?

A. It was everywhere.

X Q. 101. And you say that you are unable to state whether or not you ever heard of the Lilly preparation, Coco-Quinine prior to 1906?

A. I am.

X Q. 102. Are you willing to swear that you never did hear of it?

A. I am not.

X Q. 103. Do you say again that you knew nothing of the methods of the salesman C. J. Thurman as outlined in his deposition on behalf of the complainant herein, in pushing some of the product Quin-Coco?

A. How is that question?

85 X Q. 104. Read it.

(Question read.)

A. I do.

X Q. 105. Did you ever instruct any salesman as to how he should push the sale of Quin-Coco?

A. Not that I recollect.

X Q. 106. Do you know a gentleman by the name of Alvah Lee Kelton?

A. I do.

X Q. 107. Did you know him prior to 1907?

A. I did.

X Q. 108. Who was he?

A. He was a salesman.

X Q. 109. For whom?

A. For the Pfeiffer Chemical Company.

X Q. 110. Did you ever travel with him?

A. I did.

X Q. 111. Did you ever discuss the subject of Quin-Coco with Mr. Kelton?

A. Not that I know of.

X Q. 112. What territory did you travel with Mr. Kelton?

A. Tennessee and Kentucky.

X Q. 113. Was the Lilly product Coco-Quinine ever mentioned between you and Mr. Kelton?

A. Not that I know of.

X Q. 114. Among the equipment of a salesman do you include what has been termed here the "Blue List?"

A. Yes.

X Q. 115. For what purpose was this "Blue List" used?

Mr. Rawle: That is objected to as not proper cross-examination.

A. The "Blue List" was used so that the salesmen could quote the correct price on the item that the dealer wanted.

X Q. 116. Did you use this list in instructing your salesmen?

86 A. Probably I did.

X Q. 117. What is the date of the last issue of this "Blue List?"

A. I cannot say.

X Q. 118. What would you say to the salesman in reference to the item in this "Blue List," in giving him instructions?

A. I do not recollect.

X Q. 119. What did you instruct your salesmen to be their chief duty?

A. Get as many orders as they could.

X Q. 120. From your exhibit, "Salesmen's Confidential," at the top of page 81, I infer that the compensation of your salesmen depends altogether upon their sales of goods, is that true?

A. Not entirely, no. They get a salary and expenses, and if they produce enough business they get a commission.

X Q. 121. On the front page of this exhibit I find these words: "Use discretion in meeting competition; don't quote lower prices than necessary to secure orders." This indicates the policy of your house, does it not?

A. We have got one price—probably put there as a caution.

X Q. 122. The same paragraph continues:

"In any event, do not quote below minimum prices stated in this list."

What have you to say as to this?

A. This "Confidential" gives special prices on quantities. When those quantities were not bought, they were not entitled to those prices.

X Q. 123. How long has it been since your "Salesmen's Confidential" was first printed, and distributed to your salesmen?

A. I don't know.

X Q. 124. Is it not a fact that the blue list referred to is

87 chiefly a list of popular selling remedies, a market for which has been created by other houses and for which your house in the second column lists a substitute?

Objected to by Mr. Rawle as not proper cross-examination.

A. It is not.

X Q. 125. In what particular is the supposition of my previous question in error?

A. There are a number of our own preparations on there and the list was not gotten out with a view of substituting other remedies, but for the convenience of the salesman to be able to be in a position to quote a price on the article the man wanted and get our correct name.

X Q. 126. Are you willing to swear you did not mention Coca-

Quinine or Quin-Coco to Mr. Kelton, one of the witnesses for complainant herein?

A. I am not.

X Q. 127. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Groves, one of the complainant's witnesses herein?

A. I am not.

X Q. 128. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Hardy, one of the complainant's witnesses herein?

A. I am not.

X Q. 129. Are you willing to swear that you did not mention Quin-Coco or Coco-Quinine to Mr. Thurman, one of the complainant's witnesses herein?

A. I am not.

X Q. 130. Is your recollection as to the answers to the questions propounded to you by counsel for defendant as clear, accurate and positive as your recollection as to the answers to the questions propounded to you by me?

A. Where I positively know I say yes, and where I am in doubt I cannot say.

88 X Q. 131. Do you remember of any conferences with the complainant, or with any representative of the complainant relative to the marketing of Quin-Coco by your house prior to the beginning of this suit?

A. I cannot recollect personally, but it seems as though there was a conference of some kind, but I couldn't say,—give the details or anything about it—would not know in fact, don't know what the result of it was, I have forgotten the result.

X Q. 132. Do you remember who the conference was with?

A. If I recollect right it was Mr. Lynn.

X Q. 133. Do you remember where it was?

A. It seems as though it was in the Manufacturer's Club.

X Q. 134. In this city?

A. In this city. Of course it is vague.

X Q. 135. Do you remember who was present besides you and Mr. Lynn?

A. I couldn't say.

X Q. 136. Was Mr. G. A. Pfeiffer present?

A. Probably he was.

X Q. 137. Do you remember what was said by you to Mr. Lynn in reference to this product at that time?

A. I do not.

X Q. 138. Do you remember what Mr. Lynn said to you in reference to the product?

A. I do not.

X Q. 139. Do you remember whether or not what he did say was in the nature of a protest against your manufacturing and selling Quin-Coco?

A. I cannot remember.

HENRY PFEIFFER.

Deposition closed.

89 WILLIAM HAYWARD STONE, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your age, name, residence and occupation?

A. My name is William Haywood Stone; age 49; residence, Wayne, Pennsylvania; occupation, Assistant Superintendent of H. K. Mulford & Company.

Q. 2. Are you a graduate in chemistry, and if so where and what have been your successive employments in life?

A. I am a graduate in the Chemical Course in the University of Vermont, in 1899, and then became connected with Parke, Davis & Company from September 1st, 1889, to January, 1901, in charge of various manufacturing departments. Then I went to New Orleans, Louisiana, with the Nickell-Stone Chemical Company, until April, 1903; Meyer Bros. Drug Company, St. Louis, from April, 1903, to February, 1904; February, 1904, to date with H. K. Mulford & Company.

Q. 3. With H. K. Mulford Company have you had to do with chemical matters?

A. In the manufacture of pharmaceuticals?

Q. 4. Yes.

A. Yes, in the manufacture of pharmaceuticals.

Q. 5. In February, 1904, when you went to H. K. Mulford & Company, state whether or not they were marketing a chocolate syrup of quinine?

(Objected to as immaterial, irrelevant and incompetent.)

A. They were.

Q. 6. State whether or not this product has been ever since then listed and sold by that house?

(Same objection.)

A. It has.

90 Q. 7. I show you a bottle that has already been offered in evidence. Is this the product that you put out and the dress.

(Same objection.)

A. It is.

Q. 8. When you first had knowledge of that product, did it contain yerba santa?

(Same objection.)

A. No, sir.

Q. 9. Then, did you add yerba santa?

(Same objection.)

A. Yes, sir.

Q. 10. And what did the yerba santa take the place of in the preparation?

(Same objection.)

A. It took the place of licorice.

Q. 11. Has your house found there was a market for this product?

(Same objection.)

A. Yes, sir.

Q. 12. Where?

(Same objection.)

A. All over the United States.

Q. 13. From whom do your orders come?

(Same objection.)

A. From the retailers and the dispensing doctors and jobbers. Branch houses.

Q. 14. Do the ingredients of this preparation appear on the bottle as you have made it since about 1904?

(Same objection.)

A. The main medicinal ingredients appear on the bottle.

Q. 15. Say which?

(Same objection.)

91 A. Quinine and chloroform appear there as two of the ingredients.

Q. 16. Is cocoa one of the ingredients, and has it always been since you knew of it?

(Same objection.)

A. Yes, sir.

Q. 17. As a chemist having knowledge of a preparation of cocoa and quinine sulphate, together with yerba santa, will you state whether or not in such a preparation the cocoa has any effect in disguising the bitter taste of the quinine?

A. I consider it does; yes, sir.

Q. 18. In what form is the quinine sulphate in such a preparation?

A. It is in a crystalline form.

Q. 19. Will you state whether or not the quinine sulphate is in suspension in such a preparation?

A. It is.

Q. 20. As bearing on the question of disguising the bitter taste of the quinine in the mouth, what effect does the cocoa have in such a preparation when in the mouth of the person taking it?

A. I consider it acts through its flavor and the cloying effect of cocoa would have on the glands of the mouth.

Q. 21. Will you state whether or not chocolate and cocoa are popular flavors?

A. They are.

Q. 22. Can you say whether or not you consider them the most popular flavor?

A. I can only answer that from the general use of chocolate syrup in the soda fountain, and as a drink upon the breakfast table.

Q. 23. Do you know of any other ingredient in such a preparation that could satisfactorily replace the cocoa?

A. No, sir.

(Direct examination closed.)

92 Mr. Bradford, without waiving objections, cross-examines as follows:

Cross-examination.

By Mr. Bradford:

X Q. 24. Do you know when the particular bottle of syrup, quinine and chocolate, referred to in your direct examination, was manufactured?

A. I do not. I could tell you by looking up the records.

X Q. 25. Is it a comparatively recent manufacture?

A. Comparatively.

X Q. 26. Or one of your first?

A. It would be comparatively recent, as far as time goes. It would be over a year old, at least.

X Q. 27. I note on the label the following:

"Each dose should be followed by water, for if allowed to remain in the mouth too long the bitter taste of the quinine will be developed."

What does this mean?

A. It means that some of the syrup will remain in the mouth, and the quinine sulphate will slowly dissolve, developing a bitter taste.

X Q. 28. For what purpose is yerba santa used in such preparations?

A. For disguising the taste of quinine.

X Q. 29. For what purpose is the syrup of chocolate or cocoa used?

A. It is used as a pleasant vehicle, also to assist in the disguising of the quinine.

X Q. 30. What part does it play in disguising the taste of the quinine?

A. It is pleasant and a syrupy chocolate flavor, and its action on the glands of the mouth tends to cloy the taste.

X Q. 31. Is it not a fact that yerba santa completely disguises the taste of the quinine without the chocolate?

93 A. It does it very well. I cannot say completely.
X Q. 32. Does the chocolate do anything more than any other syrup in giving a distinctive flavor?
A. I think it would.
X Q. 33. Would not peppermint, orange, lemon, vanilla or many other syrups perform a like function if used?
A. Not to the extent chocolate would, in my opinion.
X Q. 34. Why not?
A. Because chocolate cloys the taste more.
X Q. 35. Do not other syrups do the same?
A. Not to that extent.
X Q. 36. If the taste of the quinine is disguised by the yerba santa, why could not any other common syrup be used as a flavoring?
A. Because yerba santa has been reported to have a peculiarly cloying effect on the glands of the mouth
X Q. 37. Did you ever attempt to make a syrup preparation of quinine sulphate with other flavoring syrups than chocolate or cocoa?
A. No, sir.
X Q. 38. What other liquid medicinal preparations can you name using chocolate or cocoa as the flavoring syrup?
A. None that I know of.
X Q. 39. Your reference to the popularity of this syrup, then, does not refer to medicinal preparations?
A. No, sir. May I have read the previous question and answer?

(The stenographer read the following question and answer:

"Q. What other liquid medicinal preparations can you name using chocolate or cocoa as the flavoring syrup?
A. None that I know of.")

The Witness: I thought you said syrup, not "medicinal."
94 I would have to answer that differently, then.
X Q. 40. As a flavoring syrup, I said.
A. I thought you said medicinal syrup.
X Q. 41. You may correct your answer.
A. I will change my answer on that.
X Q. 42. You may correct it.
A. Cocoa Emulsion Lilly.
X Q. 43. That is the only one?
A. That is all I can think of.

WILLIAM HAYWARD STONE.

CHARLES E. MCNULTY, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Charles E. McNulty; age, 32; residence, Brasher Falls, New York; occupation, traveling salesman for William R. Warner & Company. I have been in their employ since April 1, 1907.

Q. 2. Have you acted in that capacity all through?

A. I have not. I acted in that capacity, I judge, for about thr years. I cannot give you the exact date. At the end of that time took the position of assistant sales manager, which I held up to abo the middle of October, 1913, at which time I was employed as a sistant to the manager, and placed in charge of some of the branche That employment continued until July, 1914, at which time I too up the position of assistant sales manager again, continuing unt January 1, 1915. From that time to the present I have been oc cupying the territory of Central New York, selling goods.

Q. 3. Were you ever in the retail drug business; and if so, whe and where?

95 A. I was at Norwood, New York, from March, 1903, t April, 1907.

Q. 4. From your experience in the drug business, give your opin ion as to whether a druggist can push a given drug or a preparatio and create a market, more or less?

A. I know that he can take any certain product and create a busi ness for it.

Q. 5. Among what customers or persons could he create a market?

A. Among the general public,—laity.

Q. 6. How far could he get his doctors interested?

A. He could create a market for the product by showing it to his physicians or by demonstrating its value to the laity where there is a demand for a preparation of this kind.

Q. 7. How often do your salesmen call on their retail druggist cus tomers a year?

A. Approximately four times.

Q. 8. What percentage of the druggists in any given territory do they solicit?

A. They have instructions to visit them all.

Q. 9. As Assistant Sales Manager in the defendant company, did you have to do with teaching or instructing these salesmen in the proper method of selling goods for the house and the policy of the house with respect thereto?

A. I did.

Q. 10. What did you teach them as to the particular question of selling goods which came into direct competition with like goods of a competitor?

A. I taught them to sell our preparations on the merits of the various preparations, not to mention a competitor at all, to be strictly honest and adhere to the truth at all times. That was the basis.

Q. 11. If one of your salesmen should in any way suggest to a retail druggist that he could supply a given article of Warner in the place of a similar article supplied by another house, when the

96 latter was called for by a prescription or over the counter, would he be in your opinion an honest salesman?

A. He would not.

Q. 12. If such conduct on the part of a salesman had been brought to your attention as assistant sales manager, what would you have done?

A. I should inquire of him the circumstances connected with it and inform him that it was not the policy of the house to continue practices of that kind and warn him against repetition, with the penalty of being discontinued.

Q. 13. That is, dismissed?

A. Yes.

Q. 14. Has it ever been brought to your attention that any of your salesmen had been guilty of such misconduct except so far as you have heard it in this case?

A. No.

Q. 15. State whether or not you ever, acting for your house, authorized or suggested to any of your salesmen that he should do that thing?

A. I positively did not.

Q. 16. State whether or not you have ever, acting for your house, authorized or suggested to any retail druggist to dispense Quin-Coco S. & H., when Coco-Quinine, Lilly, was called for by prescription or over the counter?

A. I have not.

Q. 17. Have you ever had personal knowledge of a retail druggist doing that thing except so far as you have heard it in this case?

A. No.

Q. 18. How many items were there on the list which the salesmen you instructed were to sell?

A. Embracing the various firms, and considering the possible duplication of labels in various sized packages and so forth, I would say sixteen or eighteen thousand.

Q. 19. In teaching your salesmen, did you single out the Quin-Coco particularly?

97 A. I did not.

Q. 20. Please state the territory covered in the last five or six years by Warner's salesmen whose names have been mentioned in this case, Nottingham, Moon, Rogers and Starring?

A. The territory covered by Mr. Nottingham has been Georgia, Eastern and Central parts of the State, and the Western, excepting a portion immediately adjacent to Atlanta. Without a map that is as definite as I can give it.

In the case of Mr. Moon he covers the State of Virginia.

Mr. Rogers has covered the Eastern half of Michigan, but is now occupying the Western half since a year or two.

Starring has occupied the Eastern half of Michigan for two or three years.

Q. 21. Can you give me the respective territories into which the Southwestern and Gulf States are divided and the men who work them?

A. Approximately; Mr. Richards has the southern section of Texas, including the cities of Houston, Galveston and San Antonio, and some considerable outside country territory in Texas.

Mr. J. E. Jones covers the city of New Orleans and the southern section of Mississippi as well as Mobile, Ala.

Mr. McCarthy covers southern Alabama.

Mr. George Plaissance covers the northern section of Alabama.

Mr. W. H. Doster covers Florida. He had at one time a small section of southern Georgia.

Mr. Du Vall occupies the western Tennessee territory.

Mr. Gonzales covers Arkansas.

Mr. Wilkins occupies the northeastern section of Texas.

Q. 21½. Is the blue list still in use by the salesmen?

A. I could not say.

98 Q. 22. On this list are there any articles distributed by Warner against which there does not appear *on* the other column any competing article?

Objected to by Mr. Bradford on the ground that the list shows for itself.

The Witness: I think there are.

Q. 23. Do you know Alva L. Kelton, who testified in this case and who was formerly a Warner salesman?

A. I have known him.

Q. 24. Do you know whether or not he was discharged from the employ of this company?

A. I know he was discharged from the employ of William R. Warner & Company.

Q. 25. Who personally gave him his discharge?

A. I did.

Q. 26. At a personal interview?

A. Yes.

Q. 27. For what reason did you discharge him; state only facts which were admitted to you by him face to face; that is, something with which you charge him and which he admitted he had done?

A. The cause of his dismissal was that he, while being a married man with a family, had met and promised to marry a lady from Texas.

Q. 28. State whether or not he admitted those facts to you face to face?

A. He did.

Q. 29. State whether or not he admitted to you that the date had been fixed for his marriage to this lady from Texas.

(Objected to as leading, immaterial and irrelevant.)

(Question withdrawn.)

99 Q. 30. State whether or not he made any admission to you as to whether or not a date had been fixed for his marriage to the lady from Texas?

(Objected to as entirely immaterial and irrelevant and incompetent.)

A. He did admit the date had been set.

Q. 31. What did he say he had done, if anything, just before the date fixed?

(Same objection.)

A. I cannot recall just what he said he had done. In order that I may get the question clearly, do you mean what he told me he had done?

Q. 32. Did he say anything to you about how he had avoided turning up on the day he promised to marry the lady from Texas?

(Same objection.)

A. He admitted having written a letter to her stating that because of a message which had been received it would be impossible for him to meet her on the appointed day, that he found it necessary to go to Chicago to visit his mother who was ill, and that they would meet later.

Q. 33. What do you mean by "meeting" in these two uses of that word?

(Same objection.)

A. I mean that they would be married.

Q. 34. Upon his admitting these facts to you, what did you do?

(Same objection.)

A. I found it necessary to discontinue his services with the firm?

Q. 35. On the spot?

A. On the spot, yes.

Mr. Rawle: Direct-examination closed.

100 Mr. Bradford, without waiving objections, cross-examines as follows:

Cross-examination.

By Mr. Bradford:

X Q. 36. Did Mr. Kelton mention Quin-Coco in relation with the lady from Texas?

A. I don't recall that he did.

X Q. 37. Did he say anything about Quin-Coco in connection with this subject?

A. I cannot recall that he did.

X Q. 38. Do you think Kelton to be a truthful man?

A. Other than for the testimony I have previously given—I want to change that. No.

X Q. 39. Do you mean that you do not believe what he said in regard to the lady from Texas?

A. No, I do not mean that.

X Q. 40. Please explain what you do mean?

A. I mean that in making arrangements to marry this lady from Texas, when he had a wife with whom he had been living, that he was not truthful.

X Q. 41. A moment ago, in answer to a previous question, you started to say that other than as to the matter concerning which you

had just been testifying, then changed your answer to "No." Do you mean outside of this particular matter that Mr. Kelton, in your judgment, is a man worthy of belief?

A. I would not say so.

X Q. 42. Please state what other acquaintance you have had with Mr. Kelton, I mean aside from your visit to him on the occasion you have testified about?

A. None.

X Q. 43. Were you familiar with his reputation as a salesman?

A. Yes.

X Q. 44. How was he regarded as a salesman?

A. The question is not clear to me.

X Q. 45. Was he regarded as a man who followed the policy of the house in selling goods?

101 A. He was not.

X Q. 46. In what respect did he not?

A. Because he did not live within the moral meaning of their instructions to him while selling goods.

X Q. 47. Were his selling methods in harmony with the policy of the house?

A. I cannot say.

X Q. 48. Did you ever hear anything derogatory to Mr. Kelton's character or reputation other than the one incident to which you have testified?

A. Yes.

X Q. 49. While he was in your employ?

A. Yes.

X Q. 50. How long before he was discharged?

A. Two days.

X Q. 51. Would you mind telling what this report was?

A. The report was made to me by the manager of our St. Louis office that it had been intimated to him that Mr. Kelton had rather sporty tendencies, and that the case which I have heretofore mentioned might tend to prove the intimation.

X Q. 52. Do you regard the trait mentioned, that is, sporty tendencies, as wholly incompatible with honesty in business dealings?

A. I feel they have a tendency to impair honesty.

X Q. 53. Other than Mr. Kelton's so-called sporty tendencies, do you know of anything derogatory to his character or reputation?

A. I do not.

X Q. 54. As a business man?

A. I do not.

X Q. 55. Did the house ever find anything dishonest in his reports or his other dealing with them?

A. If so, they never called my attention to them.

X Q. 56. In instructing salesmen in their duties, what equipment were they given?

A. In the instruction of salesmen, what equipment were

102 they given? I am afraid you will have to make that a little more clear to me, if you please?

X Q. 57. Did you use in your instructions any printed matter or

furnish them with any printed matter to enable them to remember your instructions?

A. Yes.

X Q. 58. What?

A. The "Salesmen's Confidential and Manual."

X Q. 59. Anything else?

A. That constituted the regular equipment and instructions.

X Q. 60. Was not the so-called "Blue List" also furnished?

A. Not as a regular part of the equipment, no.

X Q. 61. Under what circumstances was that furnished?

A. That was not furnished as a part of the instructions under any circumstances.

X Q. 62. Under what circumstances was it furnished?

A. It was furnished in the instance of our employing salesmen, more particularly those who had a lack of previous pharmaceutical training.

X Q. 63. Did you ever instruct any salesmen specifically in reference to pushing Quin-Coco?

A. I did not.

X Q. 64. Did you ever travel with any salesmen when they were selling Quin-Coco?

A. I have traveled with many of the Warner salesmen and Quin-Coco always constituted a portion of the line which we were representing.

X Q. 65. Did you personally sell Quin-Coco?

A. Yes.

X Q. 66. Can you give the names of any customers to whom you sold Quin-Coco?

A. I don't think I can.

X Q. 67. In what territory, if you recall, did you sell Quin-Coco?

103 A. As far as I know, I have sold some of it in the many territories that I have traveled in, which is a large portion of the United States, all but the extreme western.

X Q. 68. As I understood your testimony, the Warner salesmen are expected to call on all of the retail druggists in their territory approximately four times a year. Does this keep them pretty well occupied?

A. I believe it does.

X Q. 69. Do they have very much spare time?

A. Not if they do that, with the other work that is allotted to them.

X Q. 70. What other work is allotted to them?

A. Calling on physicians.

X Q. 71. What proportion of their time is devoted to such work?

A. It varies in the various territories.

X Q. 72. Approximately, as an average?

A. I would say a quarter.

X Q. 73. What salesmen, for example, use a quarter of their time in calling on physicians?

A. Mr. Moon.

X Q. 74. Any other?
A. I believe there are?
X Q. 75. Can you name any?
A. I would say the condition is quite general, varying to such an extent that it would be impossible for me at this time to give you any reliable information on it.
X Q. 76. Do you refer to dispensing physicians or prescribing physicians?
A. I refer to both.
X Q. 77. About what proportion of the time would be devoted to each class?
A. I have never known any special allotment of time devoted to each class.
X Q. 78. Is your house doing considerable detail work at this time?
A. More or less, yes.
104 X Q. 79. Is it more now or less than a year ago?
A. I have no knowledge of any change.
X Q. 80. Is it more now or less than it was three years ago?
A. I would say about the same, I think.

(Redirect examination, without waiving objections, by Mr. Rawle.)

Redirect examination.

By Mr. Rawle:

R. D. Q. 81. When the complainant's proofs were taken in this case in the South, you joined counsel for the defendant at Memphis, didn't you?
A. I did.
R. D. Q. 82. And continued until that trip in the South was finished at Atlanta some three weeks later?
A. Yes.
R. D. Q. 83. State whether or not the salesmen of the Lilly Company joined the party taking the testimony at some point within the territory of such salesmen?
A. At each point I recall some salesmen for Eli Lilly & Company having been present.
R. D. Q. 84. State whether or not a number of the Lilly salesmen, to your knowledge, collected in New Orleans, and spent two or three days there with the party?
A. I believe that a portion of the Lilly salesmen force did assemble at New Orleans and spent a portion of their time with the party, either collectively or individually.
R. D. Q. 85. Was Kelton connected with St. Louis as a center, or Philadelphia?
A. Mr. Kelton covered the territory over which the St. Louis office has jurisdiction.
R. D. Q. 86. And was he, ordinarily speaking, under your jurisdiction?

A. Yes.

R. D. Q. 87. Had you seen him before you discharged him for any length of time?

A. I had not.

105 R. D. Q. 88. Had you ever seen him before that incident arose?

A. I had not.

R. D. Q. 89. Do you have jurisdiction as assistant sales manager over the St. Louis end of the business?

A. Yes.

R. D. Q. 90. Was this special discharge of Kelton, that you have related here, a special assignment from the company to you, to attend to the matter?

A. Yes, sir.

Recross-examination.

(Recross-examination without waiving objections, by Mr. Bradford.)

By Mr. Bradford:

R. X Q. 91. During the taking of complainant's depositions, while you were accompanying defendant's counsel, were the complainant's salesmen present in the room while the witnesses were being examined?

A. No, as far as I recollect. I do remember one instance, but I cannot state specifically which instance.

R. X Q. 92. On this trip do you recall being in Houston, Texas?

A. Yes.

R. X Q. 93. Do you recall while being in Houston a witness by the name of William O. Schuler, who introduced as an exhibit of your product a purchase from the Hardy Street Drug Store, R. H. Fonville, proprietor?

A. Do I remember of him presenting an exhibit?

R. X Q. 94. Do you?

A. I do.

R. X Q. 95. Do you recall visiting Mr. Fonville at his store at the close of the deposition?

A. Yes.

R. X Q. 96. Do you recall what you said to Mr. Fonville on that occasion?

(Objected to as not proper recross-examination, and as irrelevant.)

106 A. I do not recall that I made any statements, no.

R. X Q. 97. Do you recall what Mr. Fonville said to you on that occasion?

(Same objection.)

A. One of the things.

R. X Q. 98. Do you still insist that you never had any informa-

tion from any druggist that he was substituting your product when the Lilly product was called for?

A. Yes, sir.

By Mr. Rawle:

R. X Q. 99. I meant to ask you whether you had heard of any passing off by druggists, and excluding from my question any such information that you might have had from the evidence of this case. Did you so understand it?

A. I did.

By Mr. Bradford:

R. X Q. 100. Was Mr. Fonville a witness in this case?

A. I cannot say. To my knowledge he was not.

Mr. Bradford: It is admitted by counsel for the complainant that during the taking of plaintiff's depositions the salesmen in the territory adjacent to New Orleans were called in for the purpose of a conference and to obtain from them such information as they might be able to give to assist counsel in obtaining witnesses and taking proofs. Those salesmen were not, however, in the witness room during the taking of any depositions.

CHAS. E. McNULTY.

JAMES DAVID KING, called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. Give your name, age, residence and occupation?

107 A. My name is James David King; age 41 years; residence, Haddonfield, New Jersey; occupation, pharmacist and chemist.

Q. 2. In whose employ now are you and how long have you been there?

A. With Henry K. Wampole & Company. I have been there 18 years as pharmacist and chemist.

Q. 3. Had you a chemical education?

A. Graduate in 1898 of the Philadelphia College of Pharmacy. I went with Wampole in 1899.

Q. 4. State whether or not that house has put out a chocolate quinine mixture, and if so when?

Objected to by Mr. Bradford as immaterial, irrelevant and incompetent.

The Witness: It was listed in our pharmaceutical list which was gotten out in April 1906.

Q. 5. I hand you a bottle which has been offered in evidence. State if that is one of your products?

Same objection.

A. That is one of our products.

Q. 6. What ingredients does it contain, as shown by the label?

Same objection.

A. Quinine sulphate, yerba santa and chocolate.

Q. 7. State whether or not it has been listed and sold by your house ever since?

Same objection.

A. Yes, and sold ever since.

Q. 8. Has it been marketed and where?

Same objection.

A. It has a market I guess all through the United States, wherever our trade extends to.

Q. 9. Has it always been made of those same ingredients?

Same objection.

108 A. Always, yes.

Q. 10. In preparations of this sort, with quinine and chocolate or cocoa, with other suitable ingredients, what part does the chocolate or cocoa play in respect of disguising the bitter taste of the quinine?

A. Without chocolate or cocoa products, you would have an entirely different preparation.

Q. 11. Assuming that you have chocolate or cocoa products, does it play any part?

A. It certainly disguises it, yes. Originally in the cocoa there are tannins present, but through the fact that so much starch is present, it suspends uniformly, and the great thing is to prepare that syrup of chocolate. The thoroughness of the emulsion, the fact that the starch makes a homogeneous preparation, with suspensive qualities, of course holds the quinine so intimately that it masks the taste.

Q. 12. Will you state whether or not cocoa and chocolate are popular flavors?

A. I should think so, yes,—used at all soda fountains.

Q. 13. Do you know of any other ingredients that might take the place of chocolate or cocoa in connection with quinine to make up a tasteless syrup of quinine with equally satisfactory results?

A. I do not know of any syrup that you could suspend quinine in as you can with a syrup of chocolate or cocoa.

Q. 14. Have you any opinion as to whether a retail druggist can, if he chooses, push the sale of any particular drug or preparation and make a market for it?

A. I suppose he can, yes.

(Direct examination closed.)

Cross-examination.

By Mr. Bradford:

X Q. 15. What other liquid medicinal preparations do you know of that are colored and flavored with cocoa?

109 A. Off-hand I cannot think of any different product outside of that in my practice. That tablet work of course is used a great deal.

X Q. 16. When did you first learn of any liquid preparation of quinine sulphate colored and flavored with cocoa?

A. When this was brought out, in my note book I found away back in 1903 I made preparations of such a product. I don't know if it was marketed at that time. It was under a different title.

X Q. 17. Did you ever hear of Lilly's Coco-Quinine?

A. I have heard of Lilly's Coco-Quinine.

X Q. 18. Did you ever hear of Lilly's Coco-Quinine before you made up that preparation?

A. I don't know. I have not any recollection of it.

X Q. 19. How did you happen to make up your first preparation?

A. At the demand of the superintendent.

X Q. 20. Who was the superintendent?

A. Mr. W. E. Danner.

X Q. 21. Where is Mr. Danner now?

A. Mr. Danner has charge of our Canadian plant.

X Q. 22. Where is that located?

A. Perth, Ontario, Canada.

X Q. 23. For what purpose is the Yerba Santa used?

A. That is used on account of the tannin constituents.

X Q. 24. For what purpose?

A. It also helps to disguise.

X Q. 25. To what extent does it help to disguise?

A. Just to the extent of palatability, just to the extent that product of ours is. Some people claim it is not entirely disguised, but we always thought it was fairly well disguised by the conjunction of those two products.

X Q. 26. To what two products do you refer?

A. To the chocolate syrup, which of course has Yerba Santa, soluble constituents which of course contain tannins, that give it a flavor and help to disguise it. That is a part of the syrup.

110 That is made into the syrup of course all in together.

X Q. 27. Have you made up a preparation composed of simple syrup plus the cocoa, plus the quinine, at the rate of 2 grains per teaspoonful and tested it as to its bitterness?

A. No.

X Q. 28. Do you know whether such a preparation would be bitter?

A. I don't know. I have never tried that, not just the simple syrup.

X Q. 29. You never have tried then, any preparation without the Yerba Santa?

A. I cannot definitely tell if I have or if I have not.

X Q. 30. Have you ever made any such preparation?

A. I did not bring my note book along. I suppose I might have seen right there just what the early experiments were.

X Q. 31. Have you ever tried any preparation containing Yerba Santa without the chocolate or cocoa?

A. No, I have never seen any preparation without——

X Q. 32. Have you ever tried to use any preparation without the cocoa by substituting some other flavoring extract or syrup?

A. I have tried plain chocolate and I have tried cocoa and chocolate.

X Q. 33. With what results?

A. The chocolate by itself does not do as well as if you mix more cocoa and more chocolate. You always make an emulsion which is more uniform and which does not separate.

X Q. 34. As I understand you, you cannot testify of your own knowledge whether a preparation containing Yerba Santa and some other syrup than the chocolate or cocoa would be an efficient liquid quinine preparation?

A. No, I have no experience that way. Off hand, of course, the fact of such a product would indicate that we could not uni-
111 formly suspend quinine in that kind of a mixture. You must have some product—I suppose you could make a starchy product that could possibly suspend, but I do not know, I have not any knowledge.

X Q. 35. You merely followed the instructions of your superintendent?

A. Yes, I was told to make up a chocolate preparation which would suspend quinine in it.

X Q. 36. Were you given a sample of any other product to follow when you made this up?

A. Not that I recall, no.

JAMES D. KING.

Adjourned until Saturday morning, November 27th, 1915, at 9.30 a. m.

Philadelphia, Pa.,

Saturday, November 27, 1915--9.30 a. m.

Present: Parties as before noted.

CHARLES H. LA WALL, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Charles H. La Wall. Forty-five years of age. Residence, 4912 Walnut Street, Philadelphia, Pa. Occupation, analytical chemist and pharmacist. My office is at No. 39 South 10th Street, Philadelphia, Pa.

Q. 2. State at what college you graduated, and your subsequent work.

A. I graduated at the Philadelphia College of Pharmacy in 1893. During the time that I attended college, and subsequently, until
112 1904, I was employed by Smith, Kline & French Company, wholesale druggists and manufacturing pharmacists of Philadelphia, and during that time I was connected with various departments, principally the analytical chemical department. In 1901 I commenced to teach pharmacy in the Philadelphia College of Pharmacy and occupied the position of instructor until 1906. From that time to the present I have been Associate Professor of Pharmacy. In 1904 I left the employ of Smith, Kline & French Company and became associated with Dr. Henry Leffman, the Philadelphia chemist of high reputation, and three years later succeeded to his practice, he retiring from active work. Since 1904 I have been a chemist of the Department of Agriculture of Pennsylvania, working under the Dairy and Food Division. From 1907 until 1912 I was a per diem chemist in the United States Department of Agriculture engaged in the examination of drugs entering the Port of Philadelphia. I am at present consulting chemist of the State Health Department of Pennsylvania, and have been since 1907. I am also chemist to the State Pharmaceutical Examining Board of Philadelphia. Since 1907 I have been a member of the Revision Committee of the National Formulary published by the American Pharmaceutical Association. Since 1910 I have been a member of the Revision Committee of the United States Pharmacopœa, and have charge of the sub-committee concerned with the standardization of the inorganic chemicals.

Q. 3. Have you examined medical and pharmaceutical works and journals for the purpose of finding preparations of chocolate or cocoa with quinine or cinchona? If you have, please produce such literature on the subject as you deem best?

A. I have, and have the books with me arranged in chronological order.

From "New Remedies" by Robley Dunglison, M. D., published by Blanchard & Lea, Philadelphia, 1851. On page 631, among the typical prescriptions given to illustrate the methods to be fol-
113 lowed in administering drugs, with the signature sign indicating the prescription, is the following prescripton:

Quin. Sulphate, ¼ gr.
Chocolate, 6 grains.
Sugar of Milk, 2 grains.
Mix and form a powder."

1861. This is "Allgemeine Pharmacopœ" by Dr. F. L. Strumpf. Publishers, C. F. Winters, Leipzig and Heidelberg.

One page 453 is a preparation entitled "Pasta cacao, cum. china extractor." Translated: "Cocoa paste, a chocolate paste with cinchona extract." The synonym is given, "chokolanda chinæ," which means "chocolate cinchona."

"Kakas Teid, zuker, je 12, china extrakt 1th gehorig gemischt und in tafeln gethilt."

I translate this as follows:

"Cocoa mass and sugar, each 12 parts, cinchona extract 1 part. Mix thoroughly and divide into tablets."

The American Journal of Pharmacy, vol. 40, page 517, by Merihew & Son, printers, 1868, third series, vol. 16.

"On Syrup of Chocolate as a Vehicle for Quinine.

SIR:

At the suggestion of Dr. C. R. Prall, of this city, I have prepared a syrup of chocolate as an excipient for the administration of quinine, and find it to answer the purpose so admirably and to disguise the taste of the quinine so perfectly, that I send it to you for publication, although our experience with it so far has not been satisfactory, as in one case in which it was given, the child, a girl of 14 years, took xxxii grs. of quinine in 48 hours, (combined in this syrup) without any effect for which it was given, viz., chills and fever. It was supposed from this that the chocolate so affected the quinine as to destroy its anti-periodic properties, so the physician discontinued its use, and gave the sulphate of quinia in pills.

114 Since then, I have observed that a very small quantity of acid *sulph.* aromat., added to a solution of quinine in the syrup develops the bitter of the quinine intensely, the suggestion then arises, would it not be advisable to administer a small quantity of the acid or lemonade after the quinine and chocolate, to render it soluble in the stomach. None of the physicians I have mentioned it to have had an opportunity to try it since suggested, but will do so on an opportunity presenting. I advance the idea and let the profession follow it up, for it is decidedly the best excipient yet known for disguising the taste of quinine, and if it can be brought into general use, will be invaluable as a vehicle in the administering of quinine to children.

I prepare the syrup of the strength of two ounces of cake chocolate to the pint, shave the chocolate, mix it with the sugar and proceed as for simple syrup, but it is necessary to be very careful, or it will burn. One party that has tried making the syrup, has had difficulty in keeping it, as it will ferment. I have had no trouble in that way as yet. I use the full quantity of sugar and let it boil for five or ten minutes, and strain before it is cold.

Yours, &c.,

JAS. KEMBLE."

"The Druggists' Circular and Chemical Gazette," volume 15, 1871, New York; L. V. Newton, M. D., publisher and proprietor. January, page 27:

"Quinquina-Chocolate. Dr. Heuze, in Les Mondes of June last says that he has succeeded in preparing an extract of Peruvian Bark so as to possess no unpleasant bitter taste, and this is mixed with pure chocolate paste, so as to form a readily portable, and at the same time an agreeably dietetic medicine."

The same journal for the following year, 1872, February, page 40:

115 "Cocoa or chocolate, if the quinia sulphate is not in large proportion, conceals the taste to a great extent, provided it be used of a sufficient strength as in the solid or semi-fluid state."

This paragraph is taken from a lengthy article in which the subject of disguising the bitterness of the cinchona alkaloid is discussed very fully. The article is quoted from Dr. Purnell of Maryland, as appearing in the "American Journal of Pharmacy."

"A Practical Treatise on Materia Medica and Therapeutics," by Roberts Barthelow, third edition, revised, D. Appleton & Company, New York, 1881, page 147:

"A sufficient dose of quinia may easily be enclosed in a chocolate caramel."

"A Treatise on Therapeutics" by H. C. Wood, M. D., LL. D., J. B. Lippincott & Company, Philadelphia, 1883:

"A dose of the powder (referring to quinine) is best covered by chocolate or by licorice."

"Materia Medica and Therapeutics" by Charles D. F. Phillips, M. D., P. Blakiston & Sons Company, Philadelphia, 1886, page 375:

"Quinine is now sold in definite doses in a wafer, or wafer and chocolate, or in capsules; the chocolate covers the taste."

"Hand Book of Materia Medica, Pharmacy and Therapeutics" by Samuel O. L. Potter, M. A., M. D., P. Blakiston & Sons & Company, Philadelphia, 1887, page 154 (it must be the first edition, it does not give any edition):

"The persistently bitter taste of quinine and its salts is best obviated by administering them in pill form made with glycerine as an excipient, or by using licorice, eriodyction or chocolate to cover the taste, if given in solution or powder."

"The Diseases of Infancy and Childhood" by L. Emmett Holt, A. M., M. D.; Applenton & Company, New York, 1897, page 1083:

116 "This is in the administration of quinine to children":

"When the dose required is not large, as in the milder cases, the lozenges of the tannate of quinine combined with chocolate answers the purposes admirably, for these are so nearly tasteless that children will take them without difficulty."

Mr. Rawle: Defendant offers the foregoing works and journals in evidence as to the parts read and places the volumes at the disposal of the plaintiff's counsel for further examination and cross-examination.

Mr. Bradford: Complainant objects to the introduction of the

books and all evidence based thereon, except in so far as it may relate to the product and questions involved in this suit.

Q. 4. What have you to say about the professional standing of Dr. Roberts Marthelow and Dr. Horatio C. Wood, whose works you have produced and quoted from?

A. They are both very eminent in the profession of medicine in Philadelphia, or have been. Dr. Barthelow is dead and Dr. Wood has retired from practice.

Q. 5. How about Dr. Dunglison?

A. That is too far back for me to answer, except that these books are in the library as works of reference.

Q. 6. Is not Dr. Dunglison author of a number of medical works?

A. I don't know. I am not a physician.

Q. 7. Are you familiar with the preparations known as "Coco-Quinine Lilly" and "Quin-Coco, S. & H."?

A. I am only from the standpoint of having made analyses of both to ascertain their general properties and conformity to claims made upon the label.

Q. 8. State whether or not you find that the two preparations respectively conform to the claims made on their labels?

117 A. I find that they do essentially.

Q. 9. Dr. John M. Francis, a witness called for the plaintiff in this case, has testified in regard to "Coco-Quinine Lilly" as follows:

"X Q. 13. Basing your answers upon such knowledge of 'Coco-Quinine Lilly', please say whether, if the quinine sulphate is not in solution at the time of combining the ingredients as you understand them, solution of the quinine sulphate would follow such combining?

"A. I believe that the greater portion of the quinine sulphate would exist in the preparation in solution."

What have you to say about this?

A. In the specimens which I examined, the greater portion of quinine sulphate was not in solution, but was in suspension, as shown by a microscopic examination of the preparation in which the crystals of quinine sulphate were plainly visible, and were capable of being identified by appropriate tests.

Q. 10. How far did you find this to be true of "Quin-Coco, S. & H."?

A. Microscopically, the two specimens were indistinguishable.

Q. 11. As to the quinine sulphate?

A. Yes.

Q. 12. State whether or not in your opinion the cocoa in these two preparations plays a functional part therein, giving your opinion for your belief?

A. It does, because the cocoa possesses suspending qualities which enables a more permanent preparation to be made, and because it is of a characteristically agreeable flavor, which would be acceptable to a large number of the persons who would be called upon to take it.

Q. 13. What is the consistency of the preparations as produced by the cocoa?

A. It makes it thicker, and gives it what might be called
118 sheathing properties in obscuring the taste of anything that might be incorporated with it.

Q. 14. How would such sheathing properties act?

A. By obscuring or deadening the sense of taste, and by preventing substances from being brought into solution in contact with the glands of taste. This is a mechanical function and not a chemical property.

Q. 15. Is there any particular word which is sometimes used to designate the consistency?

A. Yes, the word viscosity would be correctly applicable to such a preparation.

Q. 16. What does colloidal mean? State also whether that word applies to the mixtures?

A. Colloidal means opposed to crystalline in character. Colloidal substances, among which are starches and gums, have a marked property as suspending agents. The starch in the cocoa would communicate some of this colloidal character to a preparation in which it was used.

Q. 17. What have you to say of chocolate or cocoa as a popular flavor?

A. In my experience, it is one of the most universally acceptable flavors.

Q. 18. State whether or not in your opinion any other ingredient could be substituted in such a preparation for the cocoa and give as satisfactory a result?

A. In my opinion, there could not.

Q. 19. What can you say about coloring chocolate preparations? Is it feasible?

A. Chocolate has a brown color, which is an integral property of the substance. The possibilities of modifying a brown color are limited, and any attempt in that direction I believe would result in making a preparation which would be less attractive in appearance.

Q. 20. How is the color in chocolate developed?

A. By the roasting of the raw chocolate bean, the color and flavor are simultaneously produced.

Q. 21. How far is the same true of coffee, both as to the
119 coloring in the coffee preparation and as to the roasting?

A. Coffee and chocolate are alike in that respect, that in the raw or unroasted state they possess neither an attractive flavor nor an attractive color, while in the roasted state they possess both.

Q. 22. State whether or not chocolate or cocoa in your opinion is the most suitable ingredient for this preparation, and give your reasons for your opinion?

A. Cocoa, because it contains less fat than chocolate. The excess of fat in the latter preparation would make it difficult, if not impossible, to make a satisfactory pharmaceutical product.

Q. 23. State the difference between chocolate and cocoa?

A. Cocoa is chocolate from which a portion of the fat has been

removed by mechanical means. Chocolate contains about 50 per cent. of fat. Cocoa contains from 15 to 25 per cent. of fat.

Q. 24. You have said that you have for some time been a member of the Committee of the American Pharmaceutical Society on the National Formulary. Please explain what the National Formulary is and by what authority or agency it is prepared and published?

A. The National Formulary is a book published under the authority of the American Pharmaceutical Association, the national association of pharmacists. The Committee of Revision of the National Formulary is appointed by the American Pharmaceutical Association for the purpose of bringing the National Formulary up to date, dropping old substances and introducing new substances, and revising the texts of such substances as are retained. The Committee, which consists of fifteen members, carries on its work largely by correspondence, with occasional meetings of all or part of the Committee for personal conference. Such personal conferences occur about once a year, the balance of the work being carried on
120 by correspondence, and the minutes of such personal conferences being made a matter of record.

Q. 25. What have you to say as to the manner in which new drugs or formulæ or preparations become known and ultimately find their way into the National Formulary?

A. The National Formulary Committee is called upon to provide standards for preparations in order that uniformity in such preparations may be produced throughout the whole of the United States. Many formulas find their way into the National Formulary after the preparations which they represent have originally been proprietary in character, and have subsequently been made by different manufacturing houses, not always working by the same methods. The necessity for standardization then becomes important, and the preparation is admitted.

Q. 26. How far has this been the history of the growth of the National Formulary?

A. It has *has* been the history of a number of the individual preparations of the National Formulary, of which I might mention as an example essence of pepsin, which was originally a proprietary preparation of Fairchild Brothers & Foster, and still is.

Q. 27. Go on with its history and its growth.

A. This preparation was made not only by Fairchild Brothers & Foster, but subsequently by many, if not all, pharmaceutical manufacturers. The National Formulary adopted a formula for the sake of the uniformity which would be produced of the preparation. Also the "Compound Digestive Elixir" was originally introduced by, I think, the Arlington Chemical Company.

Q. 28. Was it put out by others?

A. Many manufacturers put similar preparations upon the market under different names. The preparation was finally adopted and standardized by the National Formulary Committee.

121 Q. 29. Does this fairly show the growth of the scope of the National Formulary?

A. With regard to a number of the preparations, yes, although the

majority of the preparations are not of a proprietary nature or history.

Q. 30. Can you give some idea of how many probably had proprietary origin?

A. Only in a rough way. I should say that there were at least a dozen. Probably more.

Q. 31. What classes furnish the membership of the American Pharmaceutical Association?

A. Retail and wholesale druggists, chemists, educators, and many others interested in pharmacy or its collateral branches.

Q. 32. Have you ever been a registered pharmacist?

A. I have been a retail pharmacist and am a registered pharmacist under the Pennsylvania law at the present time. I am also a chemist working along pharmaceutical lines and a teacher in pharmacy.

Q. 33. State whether or not the National Formulary Revision Committee, of which you are a member, has ever considered placing in the National Formulary a preparation similar to the preparations here in controversy, Quin-Coco and Coco-Quinine?

Mr. Bradford: Objected to, as *whether* this Committee may have under its consideration can be of no possible value as evidence in this case. Moreover, the preceding questions and answers based upon the National Formulary are thought to have no pertinency herein. However, objection thereto is withheld for the value of the general information in the record.

A. It is, and I have the original bulletins of the Commitee showing the reference in the work of the Committee to such a similar preparation. These bulletins are sent by mail to the various members of the Committee of Revision of the National Formulary and comprehend all the work of the Committee in a form which is available for study by the members.

122 In circular letter No. 20, February 5th, 1910, on page 104, in a list of additions approved unanimously by all members voting, twelve in number, I read verbatim, as follows:

"Vote on Individual Additions.

"1. Additions approved by all members voting (12).
"Syr. quinine with chocolate, —."

On page 465:

"The following articles have been added: —."

Then on page 466:

"Syrup of quinine with chocolate."

This bulletin was a copy of the report of the National Formulary Revision Committee to the American Pharmaceutical Association, dated August 17th, 1911.

I produce a volume, the Journal of the American Pharmaceutical Association, January to December, 1913. On page 169, Exhibit 2:

"Articles for which text is not yet completed by Committee D, reported as unsettled by Mr. Cook, August 9th, 1912. —. Class B, No. 6, syrup of quinine with chocolate."

In the same bulletin, not this last quotation, but in the same bulletin of the National Formulary previously referred to, of August 1911, page 494, No. 61:

"Syrup of quinine and chocolate. Committee B," that being the reference of the Committee to whom it was referred.

This was referred to the whole Committee, of which Beringer was the General Chairman.

In bulletin No. 40 of the Committee on National Formulary, issued January 5th, 1912, in the list of non-pharmacopœal articles used in the formulas of the N. F. for which standards must be supplied, quoting from page 542 of the same bulletin, is included on page 543 the title "cacao preparata," or prepared cocoa.

In bulletin No. 47 of the Committee on National Formu-
123 lary, dated January 27th, 1912, on page 630, heading "Sub-Committee B" next line, "New Formulas":

The following new formulas are yet to be reported:

"No. 9, syrup of quinine with chocolate."

In bulletin No. 62 of the National Formulary, December 5th, 1913, page 997, heading, "Summary of Special Assignments made at Nashville * * * to Mr. Beringer:"

"No. 1, syrup of quinine and chocolate."

Bulletin No. 75 of the National Formulary Committee, August 15th, 1914, page 1202, heading, "List of Preparations admitted to the N. F. 4, No. 1."

Page 1232 of the same bulletin, "Syrupus quininæ et cacao—(No satisfactory formula yet devised)."

That is the history of the preparation in the National Formulary so far as I know.

Q. 34. Can you explain what is meant by the words just quoted by you, "No satisfactory formula yet devised."

A. It means that the sub-committee or individual to whom the preparation was referred for the construction of a satisfactory formula had not been able to combine the ingredients in a way that would make a preparation that would be pharmaceutically satisfactory.

Q. 35. State whether the "Construction of a satisfactory formula" means anything more than the names of the ingredients, and if so, what does it mean?

A. Yes. It means that not only must the names of the ingredients be known, but the precise method of combining those ingredi-

ents must be worked out by actual experimentation. No analysis of the finished preparation will give the information necessary for a satisfactory working formula for the preparation. As an example we can state that eggs, sugar, butter and flour are common ingredients in the making of a cake. You can take those same in-
124 gredients and by *coming them* together in different ways make a number of different kinds of cakes.

Q. 36. Then I understand that "formula" not only includes the idea of the ingredients to be used, but the precise method of making the article out of those ingredients?

A. That is correct. A formula in one sense may be simply an enumeration of the ingredients of a preparation. A working formula such as would be necessary for an authoritative book of standards would include specific directions as to how each step of the combination was to be effected.

Q. 37. Is the working formula of "Quin-Coco" or "Coco-Quinine" known to your Committee?

A. I can only speak of myself and the records of the Committee. So far as I know, they are not.

Q. 38. Is the formula of those two different preparations in the more restricted sense known to you or your committee?

A. The names of the ingredients are known.

Q. 39. From the label?

A. Not altogether.

Q. 40. How far is it possible to take a preparation and by analytical chemistry to ascertain the presence of cocoa and the proportion in which it is present?

A. The analysis of a preparation containing cocoa would not show cocoa as an entity, but would give factors whereby the presence of cocoa or its amount would have to be inferred, and that roughly.

Q. 41. How far is this true of other or many other preparations containing an organic ingredient?

A. That is true of many organic substances both of vegetable and animal origin, because so many vegetable or animal substances contain constituents which belong to the same class, that cannot be separated, that the accurate knowledge concerning the constituents used in a preparation can hardly ever be directly ascertained by analysis.

125 Q. 42. By "belonging to the same class," state whether or not you mean belonging to the same class as is found in other constitutents of the same preparation?

A. As I understand your question, the results of an analysis would give the ingredients found in the finished preparation. Many of those constituents thus found might be common to two or three of the original substances used in the preparation, and others might be modified by some step in the process. Therefore, the detailed statement of the results found upon analysis will never give more than a general idea of the composition of a vegetable preparation of this type.

Q. 43. Refer briefly to the United States Pharmacopœia and state what that is, and who has charge of it?

A. The United States Pharmacopœia is an authoritative book of standards recognized by the Federal and many state laws, which is published by the authority of a convention of delegates from recognized medical and pharmaceutical colleges meeting in Washington every ten years. At the convention is elected by these delegates a Board of Trustees who have in charge the business matters connected with the Pharmacopœia. At this same convention is also elected by these delegates a revision committee to whom is assigned the actual work of revision of the book. This Committee organizes, elects its officers and chairman of sub-committees, makes assignments of the work and carries on its operations both by correspondence and by personal meetings.

Q. 44. How far is the National Formulary authoritative and recognized as such by the United States and some state laws?

A. The National Formulary is recognized equally with the United States Pharmacopœia under the Federal Food & Drugs Act, and in the laws of many states.

Q. 45. Give an instance of how a preparation originally
126 proprietary has found its way into the United States Pharmacopœia?

(Objected to as incompetent, irrelevant and immaterial.)

A. The preparation originally known as cataplasm of kaolin was originally and is still a proprietary preparation known by the name of antiphlogistin. This preparation was manufactured by pharmacists throughout the country, and the necessity for greater uniformity led to its standardization by the Revision Committee of the United States Pharmacopœia.

Q. 46. By whom was it originally put out as a proprietary medicine?

(Objected to as immaterial, incompetent and irrelevant.)

A. By the Denver Chemical Company, I believe.

Q. 47. State whether or not there are other preparations in the U. S. P. which were originally proprietary and then were put out by a number of other houses, and then standardized?

(Same objection.)

A. There are.

Q. 48. Can you give an idea how many? A great many or a few?

A. I don't know exactly how many. I should say at least ten or twelve.

Q. 49. What is theobroma?

(Objected to on general principles.)

A. Theobroma is a generic name of the plant from which chocolate is obtained. It is also applied to the substance "chocolate" by some writers.

(Direct examination closed.)

127 (Mr. Bradford, without waiving objections, cross-examin as follows:)

Cross examination.

By Mr. Bradford:

X Q. 50. I understood you to testify that you had analyzed bo complainant's product known as "Coco-Quinine" and defendan product known as "Quin-Coco" and found them microscopical identical. Is this correct?

A. That is correct.

X Q. 51. Did you detect in the other steps of your analysis di ferences, and if so, what were they?

A. I could detect no essential difference between the two prepar tions expressed in terms of the analytical data which I obtained.

X Q. 58. Did you taste them both?

A. I did.

X Q. 53. And observed the color of both of them?

A. I did.

X Q. 54. What other substances do you have in mind in referrin to starches and gums with colloidal properties?

A. Acacia, tragacanth and starches derived from cereals or an other vegetable source.

X Q. 55. You stated that chocolate would not be available for us in medical preparations, or I think you said would not be possibl to use with therapeutic success in medical preparations. Will yo please explain why?

A. I did not say anything about therapeutic success. I said tha the large amount of fat in chocolate would probably render it unsatis factory from the pharmaceutic standpoint. The cocoa would b superior to chocolate on that account.

X Q. 56. Have you in your experiments made up a preparation or preparation of quinine sulphate in liquid form colored and flav ored with any other syrup than chocolate or cocoa?

128 A. No, I have done no constructive work on the prepara tion. My work has been entirely analytical.

X Q. 57. In your experience as a druggist or pharmacist, when did you first become acquainted with any liquid preparation containing quinine sulphate preparation in permanent form for dispensing at drug stores on prescription and on call?

A. My retail experience was so long ago that no liquid prepara tions of quinine sulphate, I believe, were in existence at that time.

X Q. 58. When was that experience?

A. Prior to 1892.

X Q. 59. When did you first learn of the Eli Lilly & Company preparation known as "Coco-Quinine?"

A. Shortly after I began to teach at the College of Pharmacy, which was in 1900.

X Q. 60. At that time had you known of any other similar prepar ation on the market?

A. I had not.

X Q. 61. You spoke of cocoa or chocolate being a popular flavor. What other liquid medicinal preparations have you in mind that contain this flavor?

A. I know of none in the liquid form.

X Q. 62. What would you say as to the probability of different manufacturers employing cocoa as an ingredient in a liquid medicinal preparation being likely to obtain this product of identical color and consistency?

A. They would have to have some standard to go by in order to maintain uniformity in any preparation that they would prepare.

X Q. 63. What is the principal ingredient in these preparations, Coco-Quinine and Quin-Coco, used as an agent for disguising the bitter taste of quinine sulphate?

A. Yerba Santa. That is only demonstrable by the flavor, however, not by chemical test.

X Q. 64. Have you prepared syrup preparation of quinine sulphate and cocoa with the Yerba Santa, and if so, what did you discover concerning the taste?

129 A. I did no experimental work on the preparation, made no experiments as to the qualities of the various ingredients in disguising the bitter taste of the quinine.

X Q. 65. You spoke of the impracticability of changing the color of chocolate preparations. How about liquid medicinal preparations not containing the chocolate; is it or is it not common practice to color them with other substances?

A. It is common practice in many preparations to add an ingredient which has only coloring value.

X Q. 66. What colors are used or may be used for this purpose?

A. Caramel is very commonly used. So is cochineal, so is cudbear.

X Q. 67. All various shades?

A. They can get the various shades of brown and red by the use of those and in some preparations they use coal tar colors, which give them an unlimited range.

X Q. 68. It is also true, is it not, that chocolate itself has a large variety of shades?

A. That is true, depending upon whether it has been prepared by plain expression or by expression after treatment with alkali, and also depending upon the quality or source.

X Q. 69. I notice some of the quotations from old publications referred to speak of tannate quinine. Is this quinine bitter in the same sense that quinine sulphate is?

A. No, not nearly so much.

X Q. 70. Is it difficult to disguise this taste?

A. I have never had any personal experience with it, but I am told that really the tannate makes the more bitter preparation under some circumstances than the sulphate, and in others it is more easily disguised.

X Q. 71. Is not quinine tannate in itself practically tasteless?

A. Very much so, compared with the sulphate.

(Cross-examination closed.)

130 Redirect examination.

By Mr. Rawle:

R. D. Q. 72. You have referred to various shades of chocolate. Would the use of any of these various preparations of chocolate sensibly affect the color of the preparation when you used chocolate in the quantities usual in making chocolate syrups?

A. Yes, I should think they would, from my knowledge of the different shades of chocolate on the market.

R. D. Q. 73. You have said in effect that in order to obtain identical color and consistency in a preparation by different manufacturers they would have to have a standard; state whether or not by a "standard" you mean fomula?

A. No. What I meant was this, that a manufacturer who establishes a preparation or who makes any preparation, in order to suit his trade must always have that preparation of the same shade or color, and otherwise physically identical, and in order to maintain that uniformity he would have to establish a standard for himself to which his subsequent product must conform every time.

R. D. Q. 74. If you wish to color a liquid preparation, would you ever use chocolate for that purpose, knowing it to be an insoluble article?

A. Not for purely coloring purposes, because to get enough color you would have to communicate the chocolate flavor, which would make it distinctive in that respect.

(Deposition closed.)

CHARLES H. LA WALL.

A recess was taken until 2 o'clock P. M.

131 After Recess.

SYLVESTER J. HAGAMAN, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence, and occupation?

A. Sylvester J. Hagaman; age, 39; residence, 1235 South 53rd Street, Philadelphia; occupation, drug manufacturing business.

Q. 2. Where are you now employed, and in what capacity, and how long have you been in the employ of that concern?

A. I have been in the employ of William R. Warner & Company over 20 years. I began as an office boy. About 15 years ago I became a traveling salesman and have been at it ever since, for this firm. In the last 5 years I have acted as Assistant Sales Manager from the Philadelphia office. I have nothing to do with the part of the business that centers at St. Louis. I have done a certain amount of traveling on the road while I have been Sales Manager.

Q. 3. And what authority have you as Assistant Sales Manager in taking on and discharging, as well as in overseeing your traveling salesmen?

A. I have the authority to engage or discharge a man.

Q. 4. When you engage men, what investigations do you make as to their moral worth, reputation and so forth?

A. We make a very thorough investigation as to their honesty and reliability.

Q. 5. In what directions do you so investigate?

A. We investigate through their past employers, through the retail drug trade, and investigate what other references they might give.

132 Q. 6. Do you report the result of your investigations of any particular man you have taken on to the home office?

A. I report after I have engaged him.

Q. 7. State whether or not you take part in the teaching new men the business they are undertaking and the proper method, from the standpoint of your house, by which they should carry on the business?

A. We teach largely through the "Salesman's Confidential and Manual."

Q. 8. How thorough is the drilling of each new salesman you take on in that Manual?

A. I would ask you to explain that a little further.

Q. 9. State whether or not you go into the subject in connection with the manual fully, and how fully?

A. I take up the different parts of the manual, beginning with page 79, Policy of the House, Interest on Past Due Accounts; Collections—all the way through, laying stress on "What a Salesman Should Know," and especially these clauses:

"16. That it pays strictly to adhere to the truth at all times."

"17. That it don't pay to speak ill or even mention a competitor," page 86.

On page 87 our policy in dealing with the trade is briefly stated. Then there are seven statements.

Q. 10. What do you teach them as to the necessity of entire honesty in their dealings with their customers?

A. Teach them to be thoroughly honest and reliable.

Q. 11. Do you consider it honest in a salesman to suggest to a retail druggist that the retail druggist could sell the salesman's product when the competing product of another manufacturer was called for on prescription or over the counter?

A. I consider it dishonest.

Q. 12. State whether or not you have ever had it called to
133 your attention as Assistant Sales Manager that any of the salesmen under you had done such a thing?

A. I never have.

Q. 13. If any of your salesmen should do such a thing and it was brought to your attention, what course would you pursue?

A. I would say they would be reprimanded, and if they did it again it might mean loss of their position. I would say, however, this thing has never come up.

Q. 14. In your opinion, from what you know of them, state whether or not you believe that the Warner salesmen are and have been since you have acted in that capacity an honest set of men?

A. I would say very much so.

Q. 15. How often in each year do you see each of them?

A. That is up to Mr. Pfeiffer. We have no stated time for seeing them.

Q. 16. Which Mr. Pfeiffer?

A. It depends on which Mr. Pfeiffer is there. If Mr. H. Pfeiffer is there, it is he, and if not, Mr. G. A. Pfeiffer.

Q. 17. Do they assemble at the home office every year?

A. No. I take it you mean, "Do they all?" There is no arrangement by which they report at the home office at any particular time.

Q. 18. Do you have supervision over the work they do in the sense that you know how much they have accomplished in selling goods?

A. Only while I am with them.

Q. 19. Do you make a practice to travel with any one or more of them at times—do you join them in their work among their customers and travel with them for a greater or less time?

A. I do.

Q. 20. And observe their methods of selling goods?

A. Yes.

134 Q. 21. Have you ever authorized or suggested to one of your traveling salesmen that he should or might suggest to retail druggists that they could sell Quin-Coco, S. & H., on prescriptions of doctors, or over the counter, when Coco-Quinine, Lilly, was specifically called for?

A. No.

Q. 22. How often do your salesmen visit the retail druggists in their territory?

A. I would say four times a year.

Q. 23. State whether or not they are directed or expected to call on practically all of the retail druggists in their territory?

A. Yes.

Q. 24. To what extent do they call upon physicians in their territory?

A. I would say about 25 per cent.

Q. 25. Are these the dispensing physicians or both dispensing and prescription writers, and which most?

A. I would say that 25 per cent. represents the total doctors that our men call on.

Q. 26. Are they prescription doctors?

A. They are both prescription and dispensing physicians.

Q. 27. Can you make any approximate statement as to the prevalence of dispensing doctors in different parts of the country—I mean what percentage of the doctors dispense?

A. I would say in the North and East 40 per cent. In the South, except in small towns, none.

Q. 28. What does the doctor do in respect to the drugs he administers or prescribes, which makes him a dispensing doctor?

A. A dispensing doctor is a man that carries and dispenses his own medicine.

Q. 29. Exclusively or only partly?

A. I would say it would be hard to draw a line. I understand a dispensing doctor is a man that might write some and dispense some, too.

135 Q. 30. State whether or not, in your opinion, a retail druggist can create a market for a given medical preparation?

A. He can.

Q. 31. In what way?

A. By making counter displays and by pushing it both with his customers and physicians.

Q. 32. In training a new salesman and starting him out on the road, how many items is he entrusted to sell approximately?

A. He is entrusted to sell all our lines, I would say over 5,000 items.

Q. 33. If he is going out on the road to sell 5,000 items of drugs, do you, in teaching him his duties, dwell on any particular and individual drug?

A. I would say not.

(Examination-in-chief closed.)

Cross-examination.

By Mr. Bradford:

X Q. 34. How many items over 5,000 are there in the several lines handled by your house?

A. I don't know.

X Q. 35. In teaching salesmen, do you give them any equipment to aid them in remembering your teachings; if so what?

A. They have our regular outfit, including this "Salesman's Confidential and Manual."

X Q. 36. Also the so-called "Blue List"?

A. Not necessarily.

X Q. 37. Why not the "Blue List"? Why is not that necessary?

A. That is not part of the things that we take up with the salesmen. That is not a part of the things that we take up with our travelers.

X Q. 38. When you are giving them their education in their duties?

A. Yes.

136 X Q. 39. When instructing salesmen for the house have you ever taken up with them the product known as Coco-Quinine?

A. I would say not.

X Q. 40. Does this apply to each and every salesman employed by your house?

A. Yes.

X Q. 41. And from the beginning of your official career as assistant sales manager to the present time?

—. ——.

X Q. 42. Did you ever mention Quin-Coco to your salesmen?
A. I should say that that was a sample carried regularly in our case and not especially mentioned.
X Q. 43. Then as I understand, your instructions to your salesmen are of a general character and cover the entire line without specifying any particular specialty or item?
A. Correct.

(Deposition closed.)

S. J. HAGAMAN.

Adjourned to meet at St. Louis on Monday, December 6th, 1915, at 9:30 A. M.

Pursuant to adjournment at Philadelphia, November 27, 1915, depositions of witnesses produced on behalf of the defendant in the above entitled cause, taken at Room 144 Planters Hotel, St. Louis Missouri, beginning on oMnday, December 6th, 1915, before Edward W. Tobin, acting as Special Examiner, it is hereby stipulated by counsel for the plaintiff and counsel for the defendant that the witnesses shall be sworn by Edward W. Tobin as Deputy Clerk of the United States District Court in and for the Eastern Division of the Eastern District of Missouri.

Appearances:

E. W. Bradford, Esq., for Plaintiff.
Francis Rawle, Esq., for Defendant.

137 It is agreed between counsel for plaintiff and counsel for defendant that these depositions may be taken in shorthand by William H. Corcoran and afterwards transcribed in typewriting and then signed by the witnesses:

GARFIELD D. MERNER, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Garfield D. Merner, age 32; 7124 Waterman Avenue, St. Louis County, University City, Missouri, Manager of St. Louis office William R. Warner & Company.
Q. 2. State the general course of your business experience since you first went into the drug business?
A. On August 2nd, 1899, my father and I engaged in the retail drug business at Allison, Iowa, as partners. We continued the business there until the Sume*m*r of 1902, when we sold out and on August 1st, 1902, I started as a traveling salesman for the Pfeiffer Chemical Company, continuing as such until the Spring or Summer of the following year, when I entered the employ of two uncles

of mine who were engaged in the retail drug business at Oelwein, Iowa. In the latter part of December, 1903, I came to St. Louis and entered the employ of the Pfeiffer Chemical Company, beginning at the bottom of the ladder, which was the bottling department. My ambition was to become identified with the concern in a managing capacity. I was perfectly willing to begin at the bottom, the intention being to work in the different departments. I worked in
138 various capacities in the house, and finally became identified with the management to a greater or less degree, about 1905. I have been manager of the St. Louis Branch since sometime in 1908.

Q. 3. I understand that the business is entirely managed from two head offices, Philadelphia and St. Louis?

A. It is.

Q. 4. And you have charge as manager of the St. Louis end of the business?

A. Yes.

Q. 5. Particularly, what part of the United States does your office cover?

A. The northern peninsula of Michigan, Wisconsin, Indiana, Kentucky, Tennessee, Alabama, and all territory in the United States west.

Q. 6. State whether or not you are a trained pharmacist or chemist?

A. I am not.

Q. 7. State who, in the management of the entire business, east and west, has to do with the formulas?

A. Mr. G. A. Pfeiffer.

Q. 8. How about the advertising?

A. Mr. G. A. Preiffer has charge of that.

Q. 9. How far are your duties as manager entirely commercial?

A. My duties are the commercial side of the business.

Q. 10. What different companies, if any, operate the St. Louis laboratory?

A. There are several different companies affiliated together here who have their laboratories in the same building.

Q. 11. Name them.

A. The Pfeiffer Chemical Company, William R. Warner & Company, Searle & Hereth Company, Dr. Earl S. Sloan Co., Incorporated, H. E. Bucklen & Company, and other companies.

Q. 12. Is the corporate organization of the Searle & Hereth Company kept alive?

139 A. Yes.

Q. 13. Will you state whether or not the St. Louis laboratories are carried on for the joint account for the companies you have indicated?

A. They are.

Q. 14. How many salesmen have these companies on the road, and how many of them report to the St. Louis house, who work from the St. Louis house under your direction?

A. In the neighborhood of seventy-five or eighty salesmen; be-

tween forty and forty-five under the management of the St. Louis office.

Q. 15. State how far the number has varied running back to 1908.

A. Might vary by ten.

Q. 16. State what is the practice of your salesmen with regard to calling on their customers in their respective territories, a certain number of times a year?

A. They call from six times to one time a year, varies according to the territory, certain towns in a territory they might call oftener, and other points not so frequently.

Q. 17. Upon whom do they call?

A. Retail druggists, hospitals, physicians, veterinarians and so forth.

Q. 18. Upon all the retail druggists in their territory?

A. They are expected to call upon all retail druggists whose credit is good, provided they can do so without too great an expense.

Q. 19. Can you state the respective territories of your salesmen as they have been in the past and are now, confining your answer to the eastern states of your St. Louis territory and running west to include Iowa, Missouri, Arkansas and Texas?

A. The territory has been changed some since 1908, and is substantially as follows: Northern Wisconsin and the northern peninsula of Michigan, Southern Wisconsin, Northern Indiana.
140 Southern Indiana, Cincinnati, Ohio, and Eastern Kentucky. The balance of Kentucky. Eastern Tennessee. Western Tennessee and Northern Mississippi. Northern Alabama including the City of Birmingham. The City of Mobile and territory contiguous to it. Part of Louisiana and part of Mississippi. Part of Louisiana, Southern Mississippi and part of Alabama. Southern Illinois, including part of Kentucky. Central Illinois. Northern Illinois, part of the City of Chicago. Part of City of Chicago. Part of the City of Chicago and suburbs. Northern Minnesota. Southern Minnesota, Northeast Iowa, part of Illinois. Western Iowa. Southern Iowa, Northeast Missouri. Southeast Missouri. Northern Arkansas. City of St. Louis, the suburban territory adjacent to it. East St. Louis, Illinois and nearby territory in Illinois. Kansas City, Missouri and suburb and Kansas City, Kansas. Eastern Texas, part of Louisiana and I think part of Arkansas. Southern Texas. West Texas, central Texas. Part of Texas. Part of Oklahoma. Part of Oklahoma and part of Arkansas.

Q. 20. You have a separate salesman working in each of those respective territories?

A. Yes.

Q. 21. How far have they been substantially the same subdivisions, territorially, since 1908?

A. Those are substantially the divisions. Sometimes territory is vacant which happens right at present.

Q. 22. State among what class of customers you have found a market for your product, Quin-Coco?

A. Physicians and druggists.

Q. 23. How about jobbers?

A. By druggists I mean wholesale and retail.

Q. 24. Upon what calls either by prescription or over the country, are sales made to the ultimate consumer of Quin-Coco?

141 A. Sales are made of Quin-Coco on prescriptions when Quin-Coco is specified in the prescription. They can be made over the counter when the ultimate consumer asks for Quin-Coco or asks for a preparation of chocolate and quinine or a sweet preparation of quinine and so forth.

Q. 25. From your experience as a retail druggist and in the drug manufacturing business, can a retail druggist push the sale of a given preparation and create a market for it if he chooses?

A. He can.

Q. 26. How can he do it?

A. In the case of pharmaceutical preparations he can detail it to doctors in his vicinity with a view of them specifying the product on prescriptions. He can also demonstrate it to the laity. He can advertise it if he choose.

Q. 27. From your familiarity with the stocks of pharmaceuticals ordinarily carried by retail drug stores, will you state whether or not a more or less well stocked drug store constantly carries the same pharmaceutical preparations made by different houses which are pharmaceutically or medicinally similar and can be used interchangeably in prescriptions or sales over the counter?

Mr. Bradford: Question objected to as immaterial, irrelevant and incompetent.

A. They do.

Q. 28. If a prescription calling for such a preparation, or a customer calling for it, in neither case mentions the name of the maker, what can the druggist do?

Mr. Bradford: Same objection.

A. Fill it with any manufacture.

Q. 29. Assume that the prescription specifies a particular drug and it has the name of a particular maker on it, or that the call over the counter is the same, what is the duty of the dispensing druggist?

A. It is his duty to fill the prescription with the product

142 of that manufacturer.

Q. 30. State whether or not that is a recognized duty in the ethics of the retail drug business?

A. It is.

Q. 31. State whether or not it is considered dishonest or unethical in the retail drug business to do otherwise?

A. It is.

Q. 32. What is your opinion on the subject as to whether it is dishonest to do otherwise?

A. My opinion is that it is dishonest to do otherwise.

Q. 33. State whether or not in your opinion a retail druggist who would do otherwise would be an honest man?

A. He would not be an honest man.

Q. 34. When did you become manager of the St. Louis house and what change in the general management of the business happened at that time?

A. I became manager in 1908 of the St. Louis house which was made possible from the fact that Messrs. H. and G. A. Pfeiffer moved to Philadelphia at that time.

Q. 35. Since then what have you had to do with the teaching of new salesman that have been taken on?

A. As manager of the St. Louis office I have been in charge of the salesmen and correspond with them and go over matters concerning their work there in the house.

Q. 36. Who usually looks over the new salesmen, whose duty is it to see them?

A. Our assistant sales manager.

Q. 37. Then when do you see them?

A. I do not always see them; that differs in cases; sometimes I see a man before he is employed, but most frequently afterwards, that may be a month afterwards.

Q. 38. When you see them after they are taken on, how far do you instruct them as to their duties.

143 A. I do not attempt to instruct them very thoroughly as to their duty. When they are in the house I have one or more conversations with them.

Q. 39. How far do you take up the question of honesty as essential to a salesman in such a conversation, with the new man?

A. It is my aim to always impress upon a salesman the importance of being honest.

Q. 40. Have you made use of the "Salesman Confidential" in these talks with these new salesmen?

A. I told them to study the Salesman Confidential as they would a "text book" and master it.

Q. 41. Does each of these new salesmen receive a copy of that salesman confidential?

A. Yes, and he gives a receipt for it.

Q. 42. If he loses it would he get another one?

A. Yes.

Q. 43. How far, in reference to the "Salesman Confidential" have you called attention to the printed matter on pages 86 and 87?

A. Inasmuch as the statements of the "Confidential" are clearly set forth, it is not my custom to go over it in detail. As I stated in my previous answer, I aim to impress upon the salesmen the importance of studying this book.

Q. 44. Can you state whether or not you have talked to new salesmen as to the proper attitude they are to adopt in regard to their competitors. I refer you to number 17 on page 86 of the Salesman Confidential.

A. It is my aim to caution salesmen not to talk about their competitors or speak ill of them.

Q. 45. When a new salesman comes to the house in St. Louis, state whether or not he is given a house training and to what extent?

A. When new salesmen come to the house we aim to have them

visit each department in the house and spend some time in each department, the object being to familiarize them with the manner in which the goods are put out by our company, and with the
144 goods themselves and so forth.

Q. 46. Does this familiarizing with the departments, including such departments as the printing, bottling and so forth?

A. We aim to have them visit all departments, even the power plant.

Q. 47. Give the names of some of them?

3. The power plant, bottling department, shipping department, finishing department, printing department, manufacturing department and so forth.

Q. 48. I understand that this house teaching covers only what I might call the manufacturing of the goods to be sold, is that correct?

A. It covers manufacturing of the goods and the goods themselves.

Q. 49. Now, as to the policy of the house in the sale of the goods, who gives instructions on that?

A. The assistant sales manager and the office.

Q. 50. State whether or not the foreman in charge of the different manufacturing departments, in the house that you have spoken of have anything to do with the policy of the house in selling goods or authority therein?

A. They have not.

Q. 51. Mr. C. J. Thurman, a witness called on behalf of plaintiff, testified (Plaintiff's Record, p. 606, and so forth):

"Q. 6. While you were selling the Warner line or the line of the Pfeiffer Chemical Company, did you sell a product which was called Quin-Coco?

A. Yes, sir, I did.

Q. 7. Please explain the methods and arguments you employed in soliciting orders for Quin-Coco and where you obtained your authority for such methods and arguments?

A. Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the
145 Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of the Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen, etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin. This Quin-Coco was one of the best selling specialties of the company."

Please state whether or not this Mr. Garwin had at any time any authority from you or from your company to give any such instructions whatever to salesmen?

Mr. Bradford: Question objected to as immaterial and irrelevant.

A. He did not.

Q. 52. State whether or not this Mr. Garwin ever had any authority from you as manager of the business or from the company to give any instructions to salesmen as to the sales policy of the house?

Mr. Bradford: Question objected to as irrelevant and immaterial.

A. He did not.

146 Q. 54. The witness for plaintiff, Thurman, in the testimony just quoted to you, mentions instructions "of office managers"; please state whether or not there was any manager except you having authority in the premises?

Mr. Bradford: Same objection.

A. I was the only manager.

Q. 55. State whether or not there was any other person who had authority to give instructions to salesmen in respect to the sales policy of the house?

Same objection.

A. There was not.

Q. 56. State whether or not in your last answer you confined yourself to persons employed in the house as contra-distinguished from any assistant sales manager on the road?

Same objection.

A. I did.

Q. 57. Who has been assistant sales manager on the road of late years, your assistant on the road?

A. Mr. Henry J. Ritayik and Charles E. McNulty, both of them connected in that capacity in this territory during late years.

Q. 58. The same witness, C. J. Thurman, in his testimony I have previously read to you on the record, refers to instructions "by circular letters to salesmen," what have you to say about circular letters to salesmen, who had charge of those?

A. All circular letters sent to salesmen are under the supervision of either Messrs. H. Pfeiffer, G. A. Pfeiffer or myself.

Q. 59. Explain a little more thoroughly, please, what the system was?

A. Either one of the three of us edited the letters; with possibly rare exception, in each case the letter is approved by either one of the three of us.

147 Q. 60. Are they sent out from either office?

A. It is the practice to send the same letters from both houses, Philadelphia and St. Louis offices.

Q. 61. Do you mean to say send the same letter to all salesmen, whether he comes from the St. Louis or Philadelphia office?

A. The object is all salesmen on the force receive the same circular letters.

Q. 62. When one of these letters was put in form and sent out from the Philadelphia office, state whether or not a copy of it was sent to the St. Louis office for your inspection?

A. These letters are made or printed on a duplicating machine. When the Philadelphia office edits a letter it is their practice to make sufficient copies for the St. Louis office and forward these copies to this office. The same practice holds true when the letter is edited by the St. Louis office. Each office distributes a copy to its own salesmen.

Q. 63. State whether or not you see the circular letters?

A. I do.

Q. 64. State whether or not any one of such circular letters ever contain instructions to salesmen such as are stated by the witness, C. J. Thurman in his testimony which I have read to you on the record, viz: "to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin."

Mr. Bradford: Question objected to as incompetent, the letters themselves being the best evidence.

Q. 65. State whether or not any one of such letters contained any instructions of any kind to your salesmen as to pushing the sale of Quin-Coco as a substitute for Coco-Quinine.

Same objection.

A. They have not.

148 Q. 66. In instructing your new salesmen or any salesmen as to the policy of the house in selling goods, how many separate items of goods do those salesmen have on their list for sale, approximately, covering the entire line?

A. It runs into the thousands.

Q. 67. Approximately what class of goods did it cover in a broad classification?

A. Pharmaceuticals, perfumeries, package preparations, patent medicines.

Q. 68. Can you give approximately the number in thousands?

A. I have never counted them. I would assume there were about four thousand.

Q. 69. How many perfumery items were there and how important were they?

A. Perfumery is a very important department, comprising possibly as many as two hundred and fifty items or more.

Q. 70. In instructing your salesmen as to the sales policy of the house, state whether or not you take up individual items or single items for special coaching?

A. Owing to the wide extent of the line itself, it is practically impossible, although there may have been times when one or more items were mentioned. In coaching salesmen it is my practice to speak of the line in general.

Q. 71. Do you remember ever coaching them specifically on t product Quin-Coco?

A. I cannot remember any instance where I have, but I m have mentioned it.

Q. 72. I have read to you on the record question number 6 a question number 7 of the questions put to C. J. Thurman, and t answers thereto; I now read the following from the testimony C. J. Thurman:

"Q. 8. Do you recall the names of any officers or men in a thority from whom you obtained instruction or informati
149 relative to the sale of Quin-Coco as a substitute for Co Quinine, other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner who was manag of the St. Louis Co."

What have you to say as to this testimony of C. J. Thurman?

A. I did not instruct Mr. Thurman to sell Quin-Coco as a su stitute for Coco-Quinine.

Q. 74. State whether or not you remember to have talked to J. Thurman on the subject of the sale of Quin-Coco, specifically?

A. I do not.

Q. 75. What is the best of your belief whether you ever did not?

A. I did not. I cannot recall that I did. I do not believe I di

Q. 76. Would you have had any occasion to do so?

A. When he visited the house, which he did, I believe, annuall or oftener, I always had a conversation with him, and I may hav talked about this preparation.

Q. 77. Do you remember doing so?

A. I do not.

Q. 78. If you did so, state whether or not you would have in structed him to do what Mr. Thurman testified you instructed hi to do, and give your reasons for your answer?

A. I would not have so instructed him because I considered it di honest and contrary to good business.

Q. 79. C. J. Thurman, a witness for plaintiff, testified as follow

"Q. 12. Did your representations to the retail druggist include in structions to them as to how they could dispense it and if so, wha did you tell them on that point?

A. We were instructed by the company to tell the trade that thi preparation of Quin-Coco could be used and dispensed o
150 calls for Coco-Quinine; and, that it could also be used o prescriptions for Coco-Quinine without the knowledge of th physician or the patient, as the preparation of Quin-Coco was exactl the same as Coco-Quinine."

State whether or not you ever gave such instructions or any in structions of that kind to C. J. Thurman?

A. I did not.

Q. 80. State whether or not there was anybody besides yourself at the St. Louis office who had authority to give instructions on that subject?

Mr. Bradford: Question objected to as immaterial and irrelevant.

A. There was not.

Q. 81. The same witness, C. J. Thurman, testified as follows:

"X Q. 82. And was that the time Merner talked with you?
A. Yes, and later than that.
X Q. 83. How much later?
A. Well, up to the time that I left the emloy of the company, December, 1912.
X Q. 84. What did he say to you?
A. Well, his instructions to us were about the same as Mr. Garwin's; that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money.
X Q. 85. Anything else?
A. No."

151 Also on the top of page 628 of plaintiff's record, the witness sought to correct his testimony as follows:

"Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84."

State whether or not you ever gave such instructions to C. J. Thurman, and whether or not his testimony is true?

A. I have no recollection of any specific conversation concerning these preparations with Mr. Thurman, but if, as it is possible, we did discuss Quin-Coco, I am emphatic in stating that I never instructed him that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified.

Q. 82. You have not covered all the testimony quite, of C. J. Thurman which I read to you; please do so?

A. As I understand, he states that my instructions were that "these preparations" were exact substitutes for the original preparation named by the other companies, I did not so instruct him.

Q. 83. Referring to all the testimony of C. J. Thurman, which I have quoted you above in various questions, please state whether or not C. J. Thurman told the truth in his answer to those questions?

A. From the testimony quoted in your questions, I consider in the main Mr. Thurman did not tell the truth.

Q. 84. My last question was intended to ask you whether or not C. J. Thurman, in his answers which have been read on the record,

told the truth as to instructions which you gave him in regard t the sale of Quin-Coco as a substitute for Coco-Quinine?

A. He did not.

Q. 85. When and how was Thurman's employment as salesm for your company terminated?

A. I do not remember the exact year, but I think it was i December, 1912. (Witness refers to book containing testimony.)

152 Mr. Bradford asks the examiner to note that at this poin the witness' attention was called to the testimony of Thurma by Mr. Rawle and the date stated in Mr. Thurman's answer wa accepted by the witness in making his answer.

Q. 86. Did you personally have to do with the cancellation o his contract as a salesman of the company?

A. I did.

Q. 87. Can you fix the date by your memory or without referenc to the record?

A. I cannot.

Q. 88. How near can you come to it?

A. Within a year or two.

Q. 89. Who cancelled his contract and what cause as expressed t him personally by you?

A. As I recall it, I cancelled the contract by letter. What I state in that letter, I cannot remember. But I cancelled the contract fo the reason that we were not satisfied with Mr. Thurman's result and for some time he had been more or less out of harmony with us

Q. 90. Was this stated in the letter to Mr. Thurman?

Mr. Bradford: Question objected to as the letter itself is the bes evidence, or a copy thereof if the original cannot be produced.

A. I do not recall the exact contents of the letter.

Q. 91. Have you a copy of it, or have you the Thurman file?

A. Yes, I have the Thurman file and I am confident a copy of i is in the file.

Q. 92. Please make a search at your office and produce the copy if you can find it.

A. I will do so.

Q. 93. What I want to ascertain mainly is this, did Mr. Thurman resign of his own motion or was he discharged as of the motion o the company?

A. He was discharged of the motion of the company.

153 Q. 94. In plaintiff's testimony reference has been made of a Warner salesman named L. C. Gill, what do you know about him personally?

A. I understand he resides at Muskogee, Oklahoma, and my understanding is that at times he suffers a lapse of some of his mental faculties.

Q. 95. Have you recently looked him up and did you get his location and condition?

A. In July of this year we again employed him after an absence believing that he had fully recovered He worked for us in th

capacity of traveling salesman for some weeks and then dropped out of sight. We found him at Salt Lake City and we were informed, in fact, that he seemed to lack will power and decision, and we arranged for him to be sent to Muskogee, which is the home, I think, of his wife's parents or his parents.

Q. 96. Will you state whether or not your investigation lead you to believe that his mental faculties are somewhat impaired?

A. This incident mentioned above when he dropped out of sight, and the report of the gentlemen with whom we were in correspondence at that time substantiated that opinion.

Q. 97. State whether or not you have ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Co. had ever suggested to any retail druggist that he could dispense William R. Warner's product, Quin-Coco, on a physician's prescription or sell it over the counter when Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 98. If you had had such information that any of your salesmen had done so, state whether or not that would have been contrary to his orders and to your teachings and in violation of the selling rules of the house?

A. Yes, it would have been contrary to our teaching and 154 in violation of the selling policy of the house.

Q. 99. If one of your salesmen had done so to your knowledge, state whether or not you would have considered him an honest salesman?

A. I would not.

Q. 100. If such conduct on the part of a salesman had been brought to your attention, state what you would have done?

A. I would have told him that this was contrary to our selling policy and warned him not to do it again.

Q. 101. On what penalty if he did it again?

A. Dicharge.

Q. 102. State whether or not you have in any way directly or indirectly, directed, authorized or suggested to any one of your salesmen that he should or might suggest to any retail druggist that he could dispense your product Quin-Coco on a physician's prescription or on calls over the counter when Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 103. State whether or not you have ever in any way directly or indirectly authorized or suggested to any one of your assistant sales managers that he should or that he might suggest to any of your traveling salesmen that such traveling salesman should, or might state to any retail druggist that he could dispense your product Quin-Coco on a physician's prescription or on calls over the counter where Eli Lilly & Company's Coco-Quinine was specifically called for?

A. I have not.

Q. 104. State whether or not you ever had any information or knowledge except by the testimony in this case of a retail druggist selling your product, Quin-Coco, on physicians' prescriptions or on

calls over the counter when Eli Lilly & Company's Coco-Quinine wa specifically called for?

A. I have not.

Q. 105. State whether or not you have ever directly o
155 indirectly authorized any retail druggist to do so, or in an way whatsoever suggested or represented to any retail druggis that he could do so?

A. I have not.

Q. 106. You have stated that you have been manager of the St. Louis office since in 1908 and since that time the defendant has bee selling Quin-Coco. Please state whether or not you have ever re ceived from Eli Lilly & Company, the plaintiff, any complaint o any act on the part of your salesmen in the sale of Quin-Coco?

A. The St. Louis office has never received any such complaint.

Direct examination closed.

At this point a recess was taken until 2 p. m. of the same day.

Pursuant to recess at 2 p. m., December 6, 1915, the further takin of these depositions was had as follows:

Cross-examination.

By Mr. Bradford:

Mr. Bradford, without waiving objections, cross-examines as fo lows:

X Q. 107. Do your duties require you to visit the retail trade i the sale of the preparations of your house?

A. Not to any appreciable extent since coming into the hous That was in December, 1903.

X Q. 108. In your work of instructing salesmen, have you eve made trips with them to the retail trade?

A. Before I had any position in connection with the management I recall one trip where I spent about three days with a salesman, I think that was in 1905. In one or more instances I have visite retail druggists in company with salesmen.

X Q. 109. Can you give use the name of a salesman with whom you made a trip in 1905?

156 A. W. S. Meloy.

X Q. 110. In what territory?

A. Southern Illinois.

X Q. 111. During these three days did you call upon the retai druggists in this territory and witness the methods of the salesman?

A. Yes.

X Q. 112. In pushing the sale of goods of your house?

A. Yes.

X Q. 113. Did you participate with him in the sale of the good

A. Yes.

X Q. 114. Please name any other salesman with whom you ha visited the retail trade in the sale of the goods of your house?

A. That really is the only visit I can recall where I visited the trade in company with a representative in the sale of the goods. I recall several calls that I made with another salesman on retail druggists, but they were more in the nature of friendly visits than anything else.

X Q. 115. On these visits referred to in your last answer, you were not on business of selling goods?

A. That was not my intention. I was simply in that city visiting a salesman and he introduced me to several druggists.

X Q. 116. Give us the name of this salesman?

A. H. L. Roy.

X Q. 117. In what city?

A. Kansas City, Missouri.

X Q. 118. I think you stated in your direct testimony that Mr. Thurman was discharged because he had been out of harmony with the house for some time. Please explain more fully in what particulars Mr. Thurman was out of harmony with the house.

A. I stated that was one of the reasons, I stated his being
157 out of harmony was one of the reasons. As an illustration of this disposition on his part, I recall a conversation he and I had at luncheon; he spoke in more or less glowing terms of a competitor, and I told him in effect it might be a good plan for him to work for that concern.

X Q. 119. Do you remember when this was?

A. No, I do not remember the exact date.

X Q. 120. Do you remember where it was?

A. Yes.

X Q. 121. Please state.

A. At the St. Louis Lunch Room, located on the third floor of the building at the northeast corner of Fourth and Locust Streets in St. Louis, Missouri.

X Q. 122. As I understand, one of the cardinal principles and virtues of your house is to speak well of your competitors, isn't this true?

A. We do not employ our salesmen to go around and speak well of our competitors. We instruct them not to speak ill of our competitors.

X Q. 123. Do you recall what Mr. Thurman said in reference to this competitor which occasioned the remark you made to him?

A. I do not recall the exact language.

X Q. 124. Please state as near as you can recall what it was that Mr. Thurman said?

A. Impossible for me to quote him. I recall that it was, in effect, partly, at least, "it is a wonderful line and going fine," something like that.

X Q. 125. Wasn't there a question as to salary between you and Mr. Thurman?

A. At the conversation referred to above, I do not recall any connection with that, but there had been times gone by when there was more or less discussion about salary with Mr. Thurman. In fact I do not think he hardly ever let that subject alone.

X Q. 126. Did you ever hold out any promises or in any way lead

him to believe that you would raise his salary if he continued in yo
employment?

158 A. I never made him any promises I did not fulfill.

X Q. 127. When he would ask for a raise in salary, wh would you say to him?

A. I do not recall what I said to him exactly, but Mr. Thurm was working for us on a combination contract which paid him salary and a commission on certain excess, and I very likely e plained to him that if he would earn an increase he would get it commissions.

X Q. 128. Was Mr. Thurman's work unsatisfactory as to sale

A. Being dissatisfied with his salary I felt interfered with t results; besides his work as salesman was not entirely satisfacto to us.

X Q. 129. Did you find Mr. Thurman honest in his dealings wi the house?

A. Yes.

X Q. 130. Found him truthful in his dealings with the hous

A. Yes.

X Q. 131. Since your testimony this forenoon have you looke for the Thurman letter referred to in one of Mr. Rawle's question

A. Yes.

X Q. 132. Did you find it?

A. Yes.

X Q. 133. Have you got it with you?

A. Yes.

X Q. 134. Please read what it says.

A.

"Dec. 11, 1912.

FRIEND THURMAN:

The matter of your salary was brought up at the Conference of th Stockholders recently held here, their decision being that we woul be unable to make an increase.

After going into the matter thoroughly we feel it best t
159 make a change in your territory, and herewith terminate and cancel, to take effect at once, all agreements and contracts existing between us.

While our contract calls for no notice, as an expression of our good wishes we will pay your salary, but of course, not your expenses up to and including Dec. 31, 1912. Please return by freight or ex press all samples, merchandise, catalogues, etc. As soon as your sample and merchandise account is balanced we will make a state ment of the amount due you and send you a check to cover.

We take this opportunity to express our best wishes for the future success and prosperity which no doubt will be yours.

With kindest regards,

Cordially yours,

(Signed) PFEIFFER CHEMICAL COMPANY,
G. D. MERNER,
President.

G. D. M.—35."

X Q. 135. Did you have trouble of any kind with Mr. Thurman in the settling up of his accounts at the time the contract was terminated?

A. No, sir.

X Q. 136. Do you remember of having several conversations with Mr. Thurman in reference to pushing any particular items of your line?

A. I do not recall any specific conversation on that subject. As I have testified before, it was his custom to come to the house once a year.

X Q. 137. Or oftener, I think you stated?

A. His parents lived in Whitehall, Illinois, and sometimes on account of sickness or something else he would stop here en route.

X Q. 138. When was that?

A. At least he did that once or twice.

X Q. 139. He was one of the older men in your sales force, was he not?

160 A. Yes.

X Q. 140. Always enjoyed the confidence of the company?

A. Confidence is a pretty strong word.

X Q. 141. Well, if he did not enjoy your "confidence," in what respect would you modify that word?

A. I would say we extended him our confidence.

X Q. 142. You were in the employ of the Pfeiffer Chemical Company in the fall of 1906, were you not?

A. Yes.

X Q. 143. Were you in the manufacturing department at that time?

A. No, sir.

X Q. 144. Do you recall when Quin-Coco was first brought out by the Pfeiffer Chemical Company?

Mr. Rawle: Objected to as improper for cross-examination and as relating to transactions not binding the defendant.

A. I cannot recall the exact time.

X Q. 145. Do you have personal knowledge of the work that was done in the laboratories on this product at that time?

Same objection.

A. It is entirely out of my department.

X Q. 146. Did you have personal knowledge of the work carried on in reference to it even though it was out of your department?

Same objection.

A. As I stated, being out of my department, I do not recall that I ever *saw* any experiments or anything of that kind.

X Q. 147. What was your duty at that time?

Same objection.

A. My activities were along commercial lines. I did the buying and some corresponding.

X Q. 148. What was your position at that time?

161 A. I was buyer. I also had charge of the orders.

X Q. 149. Who was in charge of the manufacturing partment.

Same objection.

A. You are speaking of the fall of 1906?

X Q. 151. Yes?

A. As long as I know anything about, even to this day for th matter, Mr. G. A. Pfeiffer had charge of the formulas. During absence, part of 1906, no one filled the position. That is no took his place.

X Q. 152. You mean that the manufacturing department without a head at that time?

A. I do not think I would put it that way. The business simp went along in the regular channels.

X Q. 153. Do you mean that Mr. G. A. Pfeiffer prepared working formulas that were used in the preparation of the produ to be put out by your concern?

A. Well, I do not exactly understand the word "prepared" the I do not think he wrote them all out at all.

X Q. 154. Well do you mean that he has worked out the formul that were used by your concern?

A. Well, I am not qualified to speak of how he managed that partment. I am not a pharmacist. It is the department that I a not in touch with.

X Q. 155. Perhaps you can answer the question better this wa Please explain what you mean by Mr. G. A. Pfeiffer being in char of the formulas?

A. I mean that he approved all the formulas and as stated in t preceding answer, just what he does, I am not qualified to say, b I consider him and it is understood that the formulas are in h charge; for instance, I personally would not make a change in formula.

X Q. 156. This duty of G. A. Pfeiffer applies to both the St. Lou and Philadelphia laboratories does it not?

A. Yes.

162 X Q. 157. Who was in charge of the working force in th laboratory of St. Louis during the time inquired about?

A. I would say Mr. H. Pfeiffer was in charge of the business.

X Q. 158. In one of your answers you spoke of various depar ments, I assume that you have a head for each department, is tha true?

A. Yes.

X Q. 159. Who is the head of your manufacturing department?

A. Mr. Pfeiffer is head of our manufacturing department.

X Q. 160. When your salesmen visit the manufacturing depar ment is Mr. Pfeiffer there to show them through?

A. No, he is not. He is in Philadelphia.

X Q. 161. Who performs this duty?

A. Why, sometimes I take the salesmen through the plant and sometimes the superintendent or whatever the case might be.

X Q. 162. Who is the superintendent of the manufacturing department?

A. I guess you and I are using different terms. When I speak of the superintendent I speak of the man who has the title of superintendent of the plant.

X Q. 163. Who has charge of the actual work of compounding preparations in your laboratory in St. Louis?

A. W. S. Garvin.

X Q. 164. How long has Mr. Garvin held this position?

A. I cannot say exactly, but for some years.

X Q. 165. Since prior to 1906?

A. Prior to 1906, yes, he was in charge of all that portion of the laboratory prior to 1906. When I use the term laboratory I do not mean the entire plant.

X Q. 166. You mean the manufacturing department? Maybe I do not know what you understand by manufacturing depart-
163 ment, and that we have been at cross purposes.

A. He had charge of the working force in part of the manufacturing department prior to 1906.

X Q. 167. And continuously from then until the present time in St. Louis?

A. Yes.

X Q. 168. What are Mr. Garvin's duties in the position he holds?

A. Why his duty includes the supervision of the manufacture of products.

X Q. 169. Do you know who authorized the commencement of the manufacture of Quin-Coco in your plant?

Mr. Rawle: Objected to unless the date is given as subsequent to August 1908.

A. I cannot say accurately about that.

X Q. 170. Did you take part in any of the discussion preliminary to the beginning of this manufacture?

Same objection.

A. I do not think so.

X Q. 171. What were your duties with the house during 1907?

Same objection.

A. I did the buying, as I recall, I had charge of adjustments, and during part of the time I employed any new employes needed in the office, and did corresponding and so forth.

X Q. 172. And you assumed full charge of the St. Louis end of the business in the year 1908?

A. Yes, it was sometime in 1908.

X Q. 173. Were you accustomed during the years 1906 and 1907, to frequently visit the laboratory?

A. In my capacity as buyer I thought it advisable to visit the different departments.

X Q. 174. Were you especially interested in the new prepa-
164 rations brought out by the house from time to time?

A. Not any more so than in the enthusiasm of youth; a young man generally likes to see new things.

X Q. 175. As a young man fired with the enthusiasm of youth, was it not your custom to frequently visit the laboratory and notice experiments being made to bring out new products?

A. I had very lit-le to do with that in that particular.

X Q. 176. Did you ever see a bottle of Coco-Quinine in the laboratories of your St. Louis house in St. Louis?

A. Yes, I think I have.

X Q. 177. Do you remember when you saw a bottle of Coco-Quinine in the laboratory here?

Mr. Rawle: Objected to as irrelevant and not proper for cross-examination.

A. No, I do not remember at all. I think I saw one not so many months ago.

X Q. 178. Would you be willing to make an oath that you did not see a bottle there in the fall of 1906?

Mr. Rawle: Same objection, and because transactions in 1906 do not bind this defendant.

A. I consider I am making all my answers under oath. I have no recollection of seeing a bottle there in the fall of 1906.

X Q. 179. Can you state positively that you did not?

A. I have no recollection of it.

X Q. 180. What were your instructions to Mr. Thurman in reference to how he could sell Quin-Coco?

A. As I have previously testified, I have no specific recollection of discussing Quin-Coco with him.

X Q. 181. Do you remember discussing any other specific product in the pharmaceutical line with Mr. Thurman?

A. No, sir.

165 X Q. 182. Have you a file of the circular letters sent out to salesmen?

A. Yes.

X Q. 183. As I understand your direct testimony, a number of the salesmen may be working for the house for some months before you meet them?

A. Yes, there may be some men working for the house before I meet them.

X Q. 184. When the men are required to visit all of the departments of the house and familiarize themselves with the manufacture of your products and with the products themselves, is this true?

A. Of course, as indicated by the previous answer, they may work some months before visiting the house, but when they do visit the house it has been our custom to have them visit the various departments, to familiarize themselves with our goods and facilities and style of the packages and so forth.

X Q. 185. For what purpose, any other purpose than you have named, is this done?

A. I think the general term "familiarize" covers it pretty well. I might explain, for instance, the salesmen visiting the stock department and looking over the shelves might see the various containers in which the various goods are packed. Being thus familiar with that would assist him in selling such quantities.

X Q. 186. Does Mr. Garvin instruct these salesmen in his department as to the manufacturing end of the business?

A. I say that the object of a salesman visiting Mr. Garvin's department is to familiarize the salesman with the quality of the goods that he makes and to acquaint the salesman with the therapeutic value and other characteristics of the goods to a degree, yes.

X Q. 187. Is Mr. Garvin qualified to instruct salesmen in such respect?

A. He seems to do it satisfactorily.

X Q. 188. That is one of his duties, is it not?

A. Very incidental if at all.

166 X Q. 189. As a matter of fact, does he not spend considerable time on a salesman when he is in that particular department?

A. Not a great deal. We do not keep salesmen in the house very long when they are here on business.

X Q. 190. I suppose what is true with respect to Mr. Garvin is true in respect to the heads of other departments, is it not?

A. Yes, generally speaking, I would say that it is sort of qualifying by a trip through the house.

X Q. 191. As a matter of fact, not being a trained pharmacist or chemist I presume you would not assume to instruct them in reference to the therapeutic or medicinal value of preparations, would you?

A. Well, I would not go into any great detail in that line because I admit I am not qualified.

X Q. 192. This makes it necessary for someone else who is qualified to perform that duty?

A. I do not know that I would say that a successful salesman should be a therapeutist.

X Q. 193. You stated that your salesmen visited the drug trade, both retail and wholesale and also physicians; for what purpose do they visit physicians?

A. The purpose is two-fold; to sell the physician those items which he dispenses if at all; if he does not dispense, detailing him on some of our products.

X Q. 194. What do you mean by "detailing" him?

A. Detailing, in commercial parlance, I would say is personal advertising. I mean advertising by word of mouth.

X Q. 195. Well, in what respect, as to the uses for which your product can be put?

A. I am not an expert detail man, but as I understand it a detail man endeavors to demonstrate to a prescribing physician the efficacy and high quality of his products. In other words, endeavors to secure the good will of the physician for the product of his manufacturer.

167 X Q. 196. Does you- house do much of this detail work?

A. We do not employ exclusively detail men, but our sale men to a greater or less degree do this kind of work.

X Q. 197. In respect to the amount of work of this character don by your salesman in 1908, how much do they do today?

A. I presume, probably, very little more now than they did the

X Q. 198. Is it a fact that detail work is going out of style amon manufacturers?

A. Well, I am not really familiar with what other manufacturer are doing. I rather hold the opinion that there is not as much don by manufacturers through the medium of detailing as there was i former years. I rather believe that the detail man has with som physicians at least become more or less of a pest, and manufacturer recognize this.

X Q. 199. Do you wish to change your answer to the former question and where you stated that you thought more was done toda than formerly?

A. I understood and still believe your former question to have in quired whether our men are doing more detailing today than the did in 1908. I did not understand your question to inquire as t the general practice of other manufacturers.

X Q. 200. Well now, please answer with the understanding tha the question applies to the trade generally, including all manu facturers, how does the amount of detailing work today compar with the amount in former years, or from 1903 to five years ago?

A. I repeat that my previous answer covers that to the effect tha I do not know just what other manufacturers are doing, but it is my impression that they are not employing as many exclusive detailing men as formerly because there seems to exist the impression tha with some doctors at least, detail men have become more or less of a pest.

168 X Q. 201. In respect to detail men becoming a pest, what is the difference as to whether he is exclusively a detail man or only a partial or combination man, we will say, a detail man and salesman?

A. It is obvious that an exclusive detail man will call on doctors oftener than a combination salesman and detail man. A combination salesman and detail man is quite likely to call on physicians who send their prescriptions to the druggist whom this combination salesman and detail man calls on.

Mr. Rawle objects to this line of cross-examination as not proper cross-examination, and in any case as a repetition and excessively and unnecessarily prolonged.

X Q. 202. In your direct testimony you gave various divisions of the territory covered by your salesmen in the central section of the country, in respect to each of these divisions did you have a separate salesman?

A. Yes; that is my earnest endeavor to have a separate salesman in each of those divisions.

X Q. 203. And each salesman is expected to call on all of the retail

druggists in his territory from six to one times a year, and on what percentage of the physicians?

A. He is expected to call on all the retail druggists whose credit is good and who are accessible without incurring too great expense. As to the per cent. of dispensing physicians, it would be very difficult for me to say.

X Q. 204. Have you ever read the "Salesman's Creed," on page 87 of the Warner "Confidential Manuel"?

A. Yes.

X Q. 205. Do you know who was the author of this literary gem?

A. No, I do not know.

169 X Q. 206. Your instructions to your salesmen as to the "Salesman's Confidential" to study it included the entire book, I assume, as well as the particular pages to which counsel has called your attention?

A. Well, when I told them to study this book, I told them to study it from cover to cover, as I recall.

Cross-examination closed.

GARFIELD D. MERNER.

Subscribed and sworn to before me this 16th day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the United States District Court in and for Eastern Division of Eastern Judicial District of Missouri.

HENRY J. RITAYIK, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and present occupation?

A. Henry J. Ritayik, twenty-nine, 2833 Magnolia Avenue, St. Louis, Missouri; assistant sales manager, William R. Warner & Company.

Q. 2. State consecutively what has been your course in life, since you have been a druggist, and when you began?

A. I began the drug business nine years ago and worked in the house, about two years, of William R. Warner & Company, and traveled in the territory for two years for Wiliam R. Warner & Company, and as assistant sales manager for five years for William R. Warner & Co.

170 Q. 3. What month and what year did you start this business.

A. I started September 28, 1906.

Q. 4. That was before William R. Warner & Co. affiliated?

A. Yes.

Q. 5. What date was that?
A. That was about in August, 1908.
Q. 6. Is that your entire connection with the drug business?
A. Yes.
Q. 7. As a salesman, what territory did you work?
A. Northern Indiana.
Q. 8. What are your powers as assistant sales manager in reg to hiring and discharging salesmen?
A. Well, as to hiring the men who spend six days with me, I struct him as to the policies of William R. Warner & Co., and I g erally leave him for three days and return three.
Q. 9. Have you the power to hire men and discharge men yo self.
A. Yes.
Q. 10. In taking on new salesmen, what amount of knowledge the drug business do you require?
A. We require registered pharmacists.
Q. 11. In a reasonably well stocked retail drug store, state wheth or not the stock includes a number of similar pharmaceutical prep rations, similar in medicinal effects, but the product of differe houses?

Mr. Bradford: Question objected to as immaterial, irrelevant a incompetent to prove any issue herein.

A. Yes, there is a lot of products of all different houses, all alik of different lines, in different stores.
Q. 12. Two or more of the same products, but different makes?

Same objection.

171 A. Yes, in most all stores.
Q. 13. State whether or not you mean that these produc in case of any particular drug are interchangeable?
A. In effect.
Q. 14. Interchangeable with regard to medicinal effects?

Same objection.

A. Yes, that is the object of it.
Q. 15. If a *prescription* writing a particular drug does not specif the name of the particular maker, state whether or not it is prope for the druggist to make his choice of the particular make?

Same objection.

A. Yes.
Q. 16. Assume that the prescription calls for a particular dru and of a particular make, is it proper for the druggist to fill tha prescription by using a drug of a different make than the one spec fied in the prescription?
A. No, except where he gets the consent of his physician. Often times that is done. I have heard it myself, when a druggist call up a doctor over the phone and asks whether he was privileged t do so.

Q. 17. If a druggist puts in a different make, when a particular make is specified, is that honest practice?
A. No, sir.
Q. 18. State whether or not that is your opinion as to the honesty of that druggist?
A. Yes.
Q. 19. State whether or not that is the recognized opinion of the drug business with regard to that practice?
A. It is.
Q. 20. State how far the same thing is true when there is a call over the counter for a preparation of a particular make, and the druggist puts in a similar product of a different make?
172 A. It should not be done.
Q. 21. This should not be done?
A. Yes.
Q. 22. State whether or not, in your opinion, that is honest in the drug business?
A. It is not honest.
Q. 23. State whether or not, according to the ethics of the drug business, that is considered honest?
A. No, sir.
Q. 24. State whether or not, in your opinion, a druggist who did either of these things would be an honest man?
A. He is not.
Q. 25. To what extent have you, as assistant sales manager of the defendant, been charged with the duty of instructing new salesmen whom you have taken on in the western department?
A. Instructed them to be honest, truthful and to sell our own products, and not mention the name of competitors in selling our products. Our "Confidential" also bears that out. I instruct them to study their "Confidential" thoroughly, and by studying it thoroughly it would give them our entire policy, and that if I was not with them, by studying this "Confidential" it would give them our policies.
Q. 26. Do each of them have a copy of the "Confidential?"
A. Yes. They all have a copy of the "Confidential."
Q. 27. As to the sale of how many items would you instruct them? Please state how many items there were being sent out by you to be sold for the house?
A. Well, is that how much of the list price?
Q. 28. The items?
A. I do not instruct them on any particular item. The object is to sell the line as a whole.
Q. 29. How many items were there in the list, approximately?
173 A. Approximately, five thousand or so—in that neighborhood.
Q. 30. State whether or not you instructed them particularly as to the sale of any one or more items among those five thousand?
A. No, sir; because we want the line sold as a whole

Q. 31. Do you know C. J. Thurman, who was once a salesman for the defendant?

A. Yes.

Q. 32. State whether or not you ever gave him instructions specifically as to the sale of Quin-Coco?

A. I never worked with Mr. Thurman.

Q. 33. Was he in the employ of the defendant when you went into their employ?

A. Yes.

Q. 34. What knowledge have you as assistant sales manager of the mental condition of Mr. L. C. Gill, formerly a salesman of the defendant?

A. He was unbalanced. Then he was out of the employ of the company about three years, and we finally re-engaged him in Northern Kansas. I should say re-engaged him for the Pacific Coast, with training in Kansas, and when sent to the Pacific Coast he stopped at Salt Lake City, and was again unbalanced, and then later on I met him in front of his home in Muskogee, Oklahoma, and at that time still felt he was unbalanced.

Q. 35. Did you talk with him at that time?

A. Yes.

Q. 36. When was that?

A. That was about nine weeks ago.

X Q. 37. Did you have knowledge of Gill's character and the quality of his work.

A. We always considered him honest.

Q. —. A good salesman?

A. Yes.

Q. 39. Better than most?

174 A. Yes, better than the ordinary.

Q. 40. Where have you found the market to be for Quin-Coco, Searle & Hereth?

A. I would say practically in all the Southern States. Of course, if you want them specially mentioned, I can mention them.

Q. 41. Among what class of customers?

A. I would say all class of dealers.

Q. 42. Specify the class, please, as near as you can in their importance?

A. As I say, all class of dealers. That would, of course, cover the better stores as well as the poorer stores. I would say some of the big druggists in Southern towns are buyers of Quin-Coco.

Q. 43. To whom is Qin-Coco sold.

A. As I said, it is sold to dealers that are considered the best dealers in town, and sold to dealers that are not considered the best dealers in town. It is sold to all classes.

Q. 44. Dealers in what?

A. Dealers in drugs.

Q. 45. To what extent, if any, is there a market among doctors?

A. Dispensing doctors?

Q. 46. Yes.

A. And prescribing doctors, as well?

Q. 47. On what kind of calls, either prescription or over the counter, is Quin-Coco sold?

Mr. Bradford: Question objected to unless the answer is based upon the witness' own experience.

A. Well, my experience is this that I have seen prescriptions for Quin-Coco; I have seen duplicates of them; I have seen prescriptions for chocolate quinine and I have heard of calls for chocolate quinine when in the drug stores.

Q. 48. On what other calls, if any, can it be properly sold?

175 A. Well, on specified calls, it is left to the dealer's discretion.

Q. 49. On specified calls for what?

A. For chocolate quinine.

Q. 50. Do you know of any other calls on which it can be sold besides chocolate-quinine or Quin-Coco?

A. Well, yes, it is sold by dealers for coughs and colds, and people come in for something for coughs and colds. I have seen Mr. Gieger in Peoria, he sold it that way.

Q. 51. Can you name any other calls on which it can be sold or it has been sold?

A. No.

Q. 52. How do you sell Quin-Coco to retail druggists?

A. I ask them whether they use Quin-Coco, Searle & Hereth Company, a chocolate-quinine containing two grains of quinine sulphate to the teaspoon.

Q. 53. State whether or not in your experience a retail druggist can push the sale of a given pharmaceutical preparation and create a market for it?

Mr. Bradford: Question objected to as irrelevant and immaterial.

A. Yes.

Q. 54. How?

A. As I say that illustration of Mr. Gieger, people coming in for something for coughs and colds and other ailments, he can give a certain product.

Q. 55. Do you know of any lines the sales of which largely depend on the special efforts of a retail druggist?

Same objection.

A. Yes, a good many lines. I would say a good many of the unadvertised items have been pushed by the retail druggist.

Q. 56. Can you state whether or not the sales of such are quite large?

176 A. Yes.

Q. 57. Can you mention any preparation that you have in mind, preparation or lines that you have in mind in this connection?

Same objection.

A. Yes, Myle's goods are pushed. The line depends a good d on the push of the retail druggist; Haywood & Hobson have b pushed a good deal by the retail druggist, and a druggist genen realizes when he buys these goods what he is going to do with th He really does not need any coaching from the ordinary travel man how to dispose of those goods.

Q. 58. State whether or not you were present at a conversat in 1912 or thereabouts between Garfield D. Merner and C. J. Th man, a salesman?

Mr. Bradford: Question objected to as leading.

A. Yes.

Q. 59. What was said there?

A. Yes, in the St. Louis Lunch Room when Mr. Thurman m the remark that the Myle goods were "a good line," and Mr. M ner told him "that is the house he ought to be with."

Q. 60. When was that conversation?

A. It was at noon, dinner time.

Q. 61. What month and what year?

A. That was in December, let me see, December, 1912, I pretty sure.

Q. 62. How soon after that did Thurman's connection with defendant as salesman cease?

A. Well, I thought it was two weeks or so.

Q. 63. Do you know whether or not there are on the market the present time and have been for some time past, chocolate-qu ine preparations made and put out by any house other than Wan & Company?

Mr. Bradford: Question objected to as irrelevant and immateri

177 A. Yes.

Q. 64. Can you name some of them?

Same objection.

A. G. F. Harvey & Company, Saratoga, New York, John Milliken, St. Louis, Meyer Brothers, St. Louis, H. K. Mulford & C Philadelphia. That is all I can recall to mind. There are a gr many others, at least nine or ten of them.

Q. 65. State whether or not you have ever seen the chocola quinine preparations on sale by those houses you have mentioned

Same objection.

A. I have seen their stock bottled.

Q. 66. In drug stores?

A. In drug stores.

Q. 67. In your opinion, one of your salesmen who should su gest to a retail druggist that he should buy your product, Qui Coco, and that he could supply it on prescription or over the count when the Lilly product, Coco-Quinine, was called for, would be a honest salesman?

A. He would not.

Q. 68. State whether or not as assistant sales manager of the defendant, you ever had any information or knowledge, except from the testimony in this case, that any salesman of William R. Warner & Co. had ever suggested to any retail druggist that he could dispense William R. Warner & Company's Quin-Coco on physicians' prescriptions or calls over the counter when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. There are some certain of our travelers that have——

Mr. Rawle: Read the question.

Question repeated.

A. They have suggested our product on calls for chocolate-
178 quinine. That was going to be my original answer.

Mr. Rawle: As that answer is not responsive to my question, I will ask that my question be re-read to him.

Mr. Bradford: I call the attention of the Court to the fact that the witness' answer to the previous question was as follows: "There are some certain of our travelers that have—" Counsel for defendant then had the examiner to re-read the question to the witness when he added to the answer as appears above.

Mr. Rawle: I now ask the question to be again re-read.

Question repeated.

A. Well, I was going to say on that question, absolutely no; that is an absolute fact. What I was going to say——

Q. 69. Confine your answer to the question?

A. The part I was going to bring up, I was going to answer this way: What I intended to answer at that time and somebody interrupted me.

Mr. Bradford: I did not interrupt you at all.

Q. 70. State whether or not you understood the question I put to you and whether the answer that you have given is the answer you desire to make to my question?

A. That is the first answer or the last answer?

Q. 71. I mean the last answer.

A. Yes, I meant that I did not have any knowledge and do not know of where a traveling man had offered our article in place of Coco-Quinine on a prescription or over the counter. That is a truthful answer to it.

Q. 72. If you had any such information that any salesman had done that thing, state whether or not that would have been contrary to his orders and your teachings and in violation of the selling
179 policies of your house?

A. Yes.

Q. 73. When I first asked if you had any information or knowledge that any salesman of Warner & Company ever suggested to a retail druggist to dispense Quin-Coco in place of Coco-Quinine, when specifically called for, will you state now whether you then

made your full answer to that or whether you were cut off by counsel before you had completed your answer?

A. I was cut off by counsel.

Q. 74. When you say you were cut off by counsel, will you say whether you mean by counsel for the plaintiff or counsel for the defendant?

A. Counsel for the defendant.

Q. 75. Under those circumstances will you state whether you have now given an answer to that question do you desire it to stand on the record as your answer to the question?

A. Yes.

Q. 76. State whether you have ever in any way as assistant sales manager of the defendant directly or indirectly directed, authorized or suggested to anyone of your salesmen that he should or might suggest to any retail druggist that he could dispense the product Quin-Coco on physicians' prescriptions or calls over the counter when Ely Lilly & Company Coco-Quinine was specifically called for?

A. I would like to have that read again.

Question repeated.

A. No, sir.

Q. 77. State whether or not you ever, as assistant manager, had any information or knowledge, except by the testimony in this case, of a retail druggist selling or dispensing your product, Quin-Coco, on physicians' prescriptions or on calls over the counter when Lilly & Company's product, Coco-Quinine, was specifically called for.

A. No, sir.

180 Q. 78. State whether or not as assistant sales manager you have ever directly or indirectly authorized any retail druggist to do so, or in any way suggested or represented to any retail druggist that he could do so?

A. No, sir.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 79. When did you last, personally, sell any Quin-Coco to any retail druggist?

A. That would be hard for me to answer until I saw the orders. I could tell you then. I visited with the different salesmen and they wrote up the orders and it really would be hard for me to give you a definite date.

X Q. 80. Can you state approximately?

A. I cannot state just definitely when the last Quin-Coco was sold.

X Q. 81. Did you sell any during the year 1914?

A. Yes.

X Q. 82. In what territory?

A. In different territories, southern territory mostly.

X Q. 83. Be more specific?
A. Well, I would say during that time I sold some in the State of Alabama.
X Q. 84. In company with whom?
A. With Mr. C. J. McCarty.
X Q. 85. What other salesman.
A. Well, that is all I can say positively right now. As I say, if I could get the different orders, I could tell positively just who I sold it with.
X Q. 86. Did you travel with other of your salesmen in the south?
A. Yes. I made a trip with practically all of them during this year.
181 X Q. 87. Also during the year 1914?
A. Yes.
X Q. 88. And those salesmen all handled Quin-Coco?
A. Yes, all of our men have it for sale.
X Q. 89. And also solicit orders from the retail trade?
A. Well, I would not say every one of them, but there were some that solicited orders for Quin-Coco. I want to give truthful answers on this and that is what I am doing.
X Q. 90. Can you tell me the names of any other salesmen than McCarty that you traveled with when Quin-Coco has been sold?
A. I can give the names of other men when it was mentioned, and there is a possibility it was sold, but to give you that specifically I could not.
X Q. 91. I want you to give me the names of those you think you traveled with and who mentioned Quin-Coco to the retail druggist in your presence?
A. Well, Mr. H. Richards.
X Q. 92. In what territory is he?
A. He is in South Texas.
X Q. 93. Anyone else?
A. That is all I can really think of right now.
X Q. 94. You mean to say that you have never heard one of your salesmen represent to a retail druggist that Quin-Coco could be dispensed when Coco-Quinine has been called for?
A. No, sir. I have not, never.
X Q. 95. Did you hear one of your salesmen mention Coco-Quinine to retail druggists?
A. I have not heard them. No, I did not hear them mention that.
X Q. 96. On what demand for your product do you expect your salesmen to sell your product, Quin-Coco?
A. Lots of times there are calls for chocolate-quinine, lots of times no specific calls, and if a druggist had no call on them, I will tell
182 him, that is the way I always put it to them, any time you have got no specific calls or a call for chocolate quinine, that Searle & Hereth Quin-Coco fills that call.
X Q. 97. When did you first hear of a chocolate quinine preparation?
A. The first I heard of it?

X Q. 98. Yes.

A. When I started selling goods.

X Q. 99. When was that?

A. That was February 1st, 1908.

X Q. 100. Is that the first time you ever heard of a liquid chocolate-quinine preparation in the drug trade?

A. Yes.

X Q. 101. Had you never prior to that time heard of Lilly's Coco-Quinine?

A. No, sir.

X Q. 102. What was the first introduction to the drug trade?

A. Lilly's Coco-Quinine?

X Q. 103. No, sir, that date?

A. That date, yes, at the time I started traveling, it was the first introduction to me that there was a chocolate-quinine on the market. I used to work in the hardware business and from the hardware business I came to Warner & Company, and I never got to know of any of these products until I got to selling goods.

X Q. 104. Please give the names of some of the customers in the south that you have called on and solicited orders for Quin-Coco either alone or in company with one of your salesmen?

A. The West End Drug Company of Montgomery, Alabama, is one instance. Then there is a little town in Mississippi, I cannot think of right now. That is all I can really think of right now where I asked them specially for that preparation. Of course, when I visit a man I generally sell the line as a whole. I do not specialize. I sell the line as a whole. When I visit a man I demonstrate to him the line as a whole.

X Q. 105. Do you specialize any product?

183 A. No; I simply take the book and go through it entirely. I do not specialize any particular product. I run right through that book.

X Q. 106. You mean the "Salesman Confidential"?

A. I start through this book, the front of this book, but I cannot stay on any one thing too long. I do not discuss any one particular product, and that is really what the house expects of me, to sell the line as a whole and not specialize on any particular thing.

X Q. 107. When you have a particularly good seller isn't it the policy of your house to push the sale of that item?

A. I will tell you to be frank, we just simply mention it. I say, how is this, and how is that, and he would say, I have got plenty and we go on.

X Q. 108. As I understand your chief experience has been in traveling as an instructor with these salesmen, not as soliciting orders, is that it?

A. My work with these men is to instruct them as to the policies of the company and more so to demonstrate to them that goods can be sold. That is my work to demonstrate to our men that goods can be sold and the house will bear me out that I do that in the amount of sales. That is my duty, to demonstrate to the salesman that he can sell one thousand dollars per week.

X Q. 109. But you have never instructed your men that any of your products could be used as a substitute for well known products of other houses?

A. No, sir, positively no.

X Q. 110. You have never represented to retail druggists that any products of your house could be sold as substitutes for well known products of other houses?

A. No, sir, I have not, and if you will pardon me, any time any of our men who I knew was attempting to do it, I would take him aside and say that is not the policy of our house. We aim to sell our goods on the merits of the product.

184 X Q. 111. From whom do you get your instructions?

A. I get them from Mr. G. D. Merner.

X Q. 112. What did Mr. Merner authorize you to do?

A. He authorized me to hire and fire salesmen and to do just as I said, authorized me to use my discretion, whenever I see fit, when they were not doing what they should do, and I carry out those policies of instruction. When I am with an old man, I simply demonstrate that goods can be sold. I outline the general policy of our house and criticise them when criticisms are due.

X Q. 113. What about Mr. Gill and the conversation you had with him nine weeks ago, what did you say to him at that time?

A. Well, he really did not have much if anything to say. I met him in front of his home and asked him where Mrs. Gill was and he did not invite me to the house.

X Q. 114. What was the purpose of your visit?

A. Just simply to see how he was getting along.

X Q. 115. Did you ask him anything about Quin-Coco?

A. No, or any other products in our line. I do not speak business at all.

X Q. 116. What time in December, 1912, was it that you had this lunch with Mr. Thurman and Mr. Merner?

A. Noon time, noon lunch.

X Q. 117. What part of December?

A. I think it was the fore part of December.

X Q. 118. What did Mr. Thurman say about Nyles' line?

A. He said that "it was a good line," and, as said before, Mr. Merner remarked "that is the line you ought to sell."

X Q. 119. Is there anything inconsistent in the policy of your house when, among yourselves, you mention the line of another house in a complimentary way?

185 A. We very seldom bring it up—not unless—I don't know of any member of the company speaking to me along that line.

X Q. 120. Is it considered sufficient cause for discharge?

A. That happened there. I really don't know what happened after that. I never visited with Mr. Thurman.

X Q. 121. My question is, if one of your men speaks well of the line of another house, is that considered a reason for discharge?

A. No, certainly not.

X Q. 122. You still insist that any salesman who would represent to a retail druggist that he could substitute one product when another product is specified is a dishonest man?

A. Yes, I do.

X Q. 123. Do you instruct your salesmen in reference to any detail work?

A. We do some detail work.

X Q. 124. Do you instruct your salesmen concerning detail work?

A. Yes.

X Q. 125. What are your instructions to the salesmen in this respect?

A. On this particular product?

X Q. 126. On any product?

A. Well, I would say this, that there is no instruction on any particular product. When we detail we detail whole products. Our time is consumed in detailing our whole products.

X Q. 127. Have you personally done detailing work for your house?

A. Yes, I have done a good deal of detail work for them personally myself.

X Q. 128. In company with other men?

A. Yes.

X Q. 129. In what territory?

A. I have done so in Central Illinois and practically every State of any importance, that is part of my work with a new man.

186 X Q. 130. Did you ever detail any physician as to Quin-Coco?

A. Yes, I have. I have mentioned Quin-Coco to them.

X Q. 131. Can you name the physicians?

A. No, I cannot.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 132. When traveling with a new salesman or an old salesman do you watch them sell or do you sell and let them watch you, which do you do, most of?

A. I do most of the selling in all cases with old as well as new men.

R. D. Q. 133. Why?

A. Because, as I stated before, I want to demonstrate to them that these goods can be sold.

R. D. Q. 134. State how far you have been successful in thus aiding in the selling of goods when traveling with your salesmen, new or old?

A. That is in the line of goods sold?

R. D. Q. 135. Yes.

A. I have sold in fourteen weeks seventeen thousand dollars worth of goods.

R. D. Q. 136. Traveling in that way?
A. With the other men, yes.
R. D. Q. 137. Is that, in your opinion, considered good?
A. Yes.
R. D. Q. 138. How good?
A. To the extent if all our men on the sales force would do like that, we would be well satisfied.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 139. What territory have you covered during that time?
A. Well, sir, I covered Illinois, I have covered Kentucky,
187 I have covered Tennessee, I covered Nebraska, Minnesota, Kansas, Missouri and Texas. Texas was not one of the States, it was Louisiana instead, with the Louisiana man.
R. X Q. 140. Did you visit all of the territory or only the large cities?
A. I simply went on trips outlined, a large city or a small town, whatever is a weekly trip, that is the way it was.
R. X Q. 141. What proportion of these seventeen thousand dollars worth of goods was Quin-Coco?
A. As I said before, I cannot say. I have no way of telling what I sold unless I look it up. I cannot answer.
R. X Q. 142. A considerable portion?
A. I cannot say that. To be frank with you. I cannot tell you the proportion of any one item.
R. X Q. 143. In selling, how did Quin-Coco compare with the other items?
A. I would say it was a good seller. In the southern territory, it is one of the good sellers. In the northern territory it is not.
R. X Q. 144. In the southern territory it is among the very best sellers, isn't it?
A. I would say it is among the best sellers. I would not say it was the very best.
R. X Q. 145. Among pharmaceuticals, as I understand, Quin-Coco is one of your best sellers?
A. One of the good sellers. I would not say the best.

Re-cross-examination closed.

HENRY J. RITAYIK.

Sworn to before me the 6th day of December, 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of U. S. District Court,
Eastn. Div., Eastn. Jdcl. Dist. of Mo.

188 Not being able to complete the taking of these depositions at this time, the same was adjourned by agreement of counsel

for plaintiff and counsel for defendant until Tuesday, December 7th, 1915, at 9.30 a. m.

Pursuant to adjournment as before stated, on December 7th, 1915, at 9.30 a. m., the further taking of these depositions was had as follows:

JAMES W. WILKINS, a witness of lawful age, produced on behalf of defendant deposes and says:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and present occupation?
A. James W. Wilkins; forty-one the fifth of this month; Denison, Texas; Traveling Salesman for Pfeiffer Chemical Company and allied lines.
Q. 2. Do you travel for William R. Warner & Company?
A. Yes.
Q. 3. State briefly and consecutively your connection with the drug business from the start?
A. Well, I entered the drug business when I was fourteen years old, at Denison, Texas, with Mr. W. H. Robert, Junior. I was with Mr. Robert about a year and a half and I followed the drug busines off and on ever since, with the exception of possibly four or five years, something like that. I have been in the drug business at different intervals during all of the time since I was fourteen years old, retail drug and also traveling salesman selling the drug line.
Q. 4. With what successive retail drug concerns were you connected, giving the years as nearly as you can?
189 A. In the years 1893 and 1894, I operated a drug store for myself at Cale, Indian Territory, now Calera, Oklahoma.
Q. 5. What next?
A. Well, I was in the drug business with R. S. Hedrick, at Kemp, Oklahoma.
Q. 6. Were you a partner?
A. I was a silent partner, interested with him.
Q. 7. Did you attend to the business there?
A. Yes.
Q. 8. What next?
A. Well, I managed the business and later on sold out to my partner, Mr. Hedrick and went to Norman, Oklahoma, and then returned to Denison, Texas, and for a short while began traveling for W. H. Bull & Company, St. Louis, Missouri, medicine business, proprietary medicine business. I traveled for them, that was along 1906, and I traveled for them until the latter part of 1907. I entered the employ of the Pfeiffer Chemical Company the following year, 1908, and I have been with those concerns ever since.
Q. 9. What has been your territory?
A. The first year I was with them I worked East Texas and South-

ern Arkansas. Since then I worked Western Louisiana and East Texas.

Q. 10. What large cities does your territory cover?

A. Well, no real large cities, Shreveport is the largest city in the territory.

Q. 11. Are you a registered pharmacist?

A. Yes.

Q. 12. In what State?

A. Oklahoma.

Q. 13. State whether or not the Searle & Hereth product, Quin-Coco, has been sold by you in your territory during these years, more or less?

A. Yes.

Q. 14. State whether or not the sales have been in fair quantity?

A. Well, they have been fair.

190 Q. 15. How often do you call on your druggists?

A. About every three and a half months. It will vary a little bit but in the neighborhood of that.

Q. 16. How many of them are there in your territory?

A. I never counted them. I cannot say.

Q. 17. Give approximately the number?

A. I do not know, I cannot say just how many.

Q. 18. Would there be as many as one hundred and fifty.

A. I should think so.

Q. 19. Two hundred and fifty?

A. Well, I should think there would be that many.

Q. 20. State whether or not you called on physicians in your territory, particularly dispensing physicians?

A. I do.

Q. 21. How often?

A. Well, I do not call regularly as a rule, I call on them about every other trip, not every trip, sometimes I will skip and maybe the third trip.

Q. 22. About how many dispensing physicians do you call on in this way?

A. Well, I cannot recall from memory.

Q. 23. As many as fifty?

A. I would judge so.

Q. 24. As many as one hundred?

A. It may be one hundred and may not be quite so many.

Q. 25. Have you seen any other chocolate-quinine preparation in your territory except Eli Lilly & Company and Searle & Hereth's?

Mr. Bradford: I object to that as irrelevant and immaterial.

A. Yes.

Q. 26. Name the makers thereof?

Same objection.

191 A. First Texas Chemical Company, Dallas, Texas, John T. Milliken & Company, St. Louis, H. K. Mulford & Company, Philadelphia.

Q. 27. Where have you seen their goods?

Same objection.

A. I have seen their goods in various drug stores that I visited.

Q. 28. State whether or not these are competitive products with your Quin-Coco product?

Same objection.

A. To be sure, yes, they are competitors.

Q. 29. State whether or not you sold the entire Warner line including Searle & Hereth, Pfeiffer Chemical Company, and other companies for whom Warner is distributor?

A. Yes, I do.

Q. 30. About how many items are there on those various lists?

A. I have never counted them.

Q. 31. Do they run up into the thousands?

A. I cannot say.

Q. 32. State whether or not you solicit sales in your territory for the entire line?

A. You mean the different lines?

Q. 33. For the entire line?

A. I do.

Q. 34. State whether or not you put special efforts on a few individual items in your line or on the line as a whole?

A. On the line as a whole.

Q. 35. If a retail druggist having a call over the counter or on prescription for a given preparation made by a specified drug house and he dispenses a like preparation made by a different drug house, state whether or not, in your opinion, that is honest in the drug business, assuming that the customer in the one case, and

192 the physician in the other case is not informed?

A. That would depend in my opinion, on circumstances.

Q. 36. I will put the question a little differently: When a prescription calls for a medicinal preparation and specifies the particular maker in the prescription, and the druggist, without telling the doctor, fills it by using a similar preparation made by a different house, state whether or not, in your opinion, that is honest in a druggist?

A. Well, I don't know.

Q. 37. What is the duty of a druggist as to putting into a doctor's prescription the article called for by the prescription?

A. It is the duty of the druggist to carry out the wording of the prescription.

Q. 38. If, without telling the doctor, he puts in something else, is that honest?

A. If he dispenses something in lieu of what the prescription calls for?

Q. 39. Yes. That is what I asked.

A. I would not consider it honest.

Q. 40. If a customer over the counter calls for a given prepara-

tion and the druggist sells him a different preparation without telling him, is that honest in the druggist?

A. No, sir, I should not think so; unless he specifies the name of the article he wants and he does not call the purchaser's attention to the change, I would consider that a dishonorable act.

Q. 41. State whether or not you would consider a druggist who did that sort of thing a dishonest man in his business?

A. Well, I would say this much: I would not consider that he did right.

Q. 42. If a drug salesman suggested to a druggist that he could do such a thing, would you consider that honest business in a drug salesman?

193 A. State your question again, please.

(Question read.)

A. Well, I couldn't consider it a dishonorable act.

Q. 43. What wouldn't you consider a dishonorable act?

A. What I consider a dishonorable thing: If a man is filling a prescription calling for one thing and a man telling another man to use something else.

Q. 44. Do you know John F. Whitley, a druggist?

A. Yes, sir.

Q. 45. Where is his business?

A. Winfield, Louisiana.

Q. 46. In your territory?

A. Yes, sir.

Q. 47. Do you remember soliciting his business on the Warner line at any time?

A. Well, I called on him regularly when in my territory.

Q. 48. How many times have you called on him since you began with the house?

A. I couldn't say.

Q. 49. For how many years have you been calling on him?

A. At Winfield?

Q. 50. At Winfield or at any other place?

A. It has been something, I think, about five or six years.

Q. 51. How large a place is Winfield?

A. I don't know, sir.

Q. 52. State whether or not you have solicited his trade on the whole Warner line which you carry.

A. Yes, sir, I have.

Q. 53. When you go over the Warner line with Whitley and get to Quin-Coco, what is your practice to say to him on this subject?

A. Well, I sell the entire line. I don't know that I have ever put any stress—any particular stress on Quin-Coco.

194 Q. 54. You remember what your practice is to say to him on the subject of Quin-Coco?

A. I don't remember any particular time that I have specially said anything to him on Quin-Coco. No doubt, I have shown it to him in the line.

Q. 55. What do you tell him when you show it to him in your line?

A. I tell him I have a preparation known as Quin-Coco.

Q. 56. What else?

A. Chocolate-quinine.

Q. 57. Containing what?

A. Two grains of sulphate of quinine to a teaspoonful.

Q. 58. You speak of its qualities?

A. I tell him it is a good preparation.

Q. 59. Anything else?

A. I no doubt tell him that in my opinion it is a smooth piece of goods as the average on the market or similar to it.

Q. 60. John F. Whitley called as a witness for plaintiff, testified as follows:

"Q. What did the salesman say to you in reference to Quin-Coco, as near as you can remember?

A. Well, in going over the items we would be buying, he told us that he wanted us to let him make us prices on Quin-Coco; as we could save considerable money. He saw that we had a considerable trade on Coco-Quinine and he wanted to give us prices on Quin-Coco where we could save money by using it.

Q. What else did he say to you in reference to it?

A. He said it was an identical preparation to Coco-Quinine; that we could sell it on the same prescriptions that we had been selling the Coco-Quinine."

State whether or not you said that to Whitley?

195 A. No, sir, I didn't state that to him.

Q. 61. State whether or not you said to Whitley that he could dispense Quin-Coco the same way on calls for Coco-Quinine?

A. No, sir.

Q. 62. What is your selling talk on this product?

A. I generally show it to a customer in connection with the other preparations in the line, and tell him I have a chocolate-quinine containing two grains of sulphate quinine with a chocolate base, containing chocolate; that it is a smooth preparation.

Q. 63. Have you always had a copy of the "Salesman's Confidential"?

A. Yes, sir.

Q. 64. Would you consider it would be honest in Whitley to dispense Quin-Coco on calls for Coco-Quinine?

A. No, sir.

Q. 65. Would you consider it would be honest for you to tell him he could do that, or persuade him that he could?

A. Repeat the question please, sir.

(Question Q. 65 read.)

A. You ask me if I consider it honest for a man——

Q. 66. For a salesman to tell a druggist that he could sell Quin-Coco when Coco-Quinine was called for?

A. I don't quite comprehend the question. Wasn't that question answered a few minutes ago, or a similar question?

Q. 67. A similar question. Would it be honest in a salesman to tell a druggist that he could dispense Quin-Coco on calls for Coco-Quinine?

A. If he would have a call for Coco-Quinine and the salesman would say to him to use Quin-Coco in lieu of the Coco-Quinine?

Q. 68. That is the question I asked you.

A. Am I allowed to have any of the previous part of my testimony re-read to me?

196 Q. 69. Yes.

A. I wish you would turn and read to me the part of the testimony there that Mr. Rawle asked me about as to how I sell Quin-Coco.

(Testimony from Q. 61 to Q. 67, inclusive, read.)

A. I would like to have the questions re-read to me to make it clear in my mind, so I won't confuse the questions in my mind.

Mr. Bradford: I also want it noted on the record that this discussion over the interpretation of this last question has occupied about six minutes.

The Witness: It may occupy more time than that. I don't have to be in a hurry about answering these questions, do I?

Mr. Bradford: I simply wish the record to show how long it takes for the witness to make up his mind to answer a simple question such as the last one.

Mr. Rawle: I wish to state upon the record that the discussion with the witness which has ensued within the last few minutes was joined in by counsel for plaintiff.

Mr. Bradford: I wish to state that I did not have anything to say in this dialogue or discussion until at least five minutes had elapsed, and the substance of what he has said is already on the record.

(Question Q. 67 read.)

A. I thought that I answered that question in a previous statement?

Q. 70. Please answer it now.

A. The question is: Would I consider it honest for a druggist to dispense Quin-Coco where there was a call for Coco-Quinine?

197 It seems to me that the question has already been asked and answered. It seems to me like the former question was similar to this one. I wish you would turn back and read it to me.

Mr. Bradford: Any further reading of witness' deposition is objected to as entirely unnecessary. The question is plain, and if the witness cannot answer he should so state.

A. The question still is not clear to my mind.

Mr. Bradford: You have asked it yourself? Can't you answer a question you asked yourself.

Mr. Rawle: Please read to the witness the last question.

(Question Q. 67 read, and all that follows to this point, read to the witness.)

Q. 71. What I asked you was whether you would consider it hon for a salesman to tell a druggist that he could dispense Quin-Co when he had a call for Coco-Quinine?

A. I would not consider it honest.

Q. 72. Will you state on what sort of calls over the counter or prescriptions a retail druggist could properly sell Quin-Coco?

A. Well, there are calls for chocolate quinine syrup. I suppose person would be allowed to dispense Quin-Coco for a Chocola Quinine Syrup, and of course, under its own name, Quin-Coco.

Q. 73. Any others.

A. Yes, sir, if a customer should call and call for a syrup co taining quinine, I think a druggist would be justified in dispensi Quin-Coco.

Q. 74. For what complaints is quinine usually administered?

A. For malaria, for colds.

Q. 75. What about calls for colds and malarial medicines?

Mr. Bradford: Objected to as leading and immaterial.

198 A. There is a demand for that kind of product.

Q. 76. State whether or not such a call could be filled b Quin-Coco?

A. I don't see why it should not.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 77. In selling the Warner line I assume that you follow th selling policy of your house?

A. As near as I know how, yes, sir.

X Q. 78. You are familiar with that policy?

A. Reasonably familiar, yes, sir.

X Q. 79. From whom did you obtain your education in that re gard?

A. You mean when I first went with the William R. Warne people or Pfeiffer Chemical Company?

X Q. 80. Then or since?

A. I couldn't say; they have general salesmen with me in th territory.

X Q. 81. Who?

A. Mr. H. H. Richards for one; a Mr. Allen for another; a Mr McNulty for another; a Mr. Ritayik; and also Mr. H. Pfeiffer, th president of William R. Warner & Company.

X Q. 82. All of the gentlemen named have traveled with you a different intervals?

A. At different intervals.

X Q. 83. They were all familiar with the methods employed by you in selling their goods?
A. I can't say.
X Q. 84. In traveling with you did they observe your sales or co-operate with you in making sales?
A. They co-operated with me, yes, sir.
X Q. 85. Visited the druggists with you?
A. Yes, sir.
X Q. 86. Heard you talk to the druggists?
199 A. Well, I don't know every particular thing that I said to the druggist, I don't know that they did.
X Q. 87. When you were selling a bill of goods to a druggist, the gentleman of the list above named who might be with you would take down the order, would he not?
A. Sometimes they would and sometimes they would not.
X Q. 88. Have you ever had instructions at the Home office?
A. On Salesmanship?
X Q. 89. Yes.
A. Not that I remember.
X Q. 90. Have you ever had any information given to you at the Home office respecting the various products you were selling?
A. Yes, sir.
X Q. 91. By whom?
A. By whom?—Mr. Garvin I think it is.
X Q. 92. Any others?
A. You mean pertaining to selling the goods?
X Q. 93. I mean pertaining to the products themselves?
A. Yes, sir, I have had conversations with Mr. Garvin, the chemist
X Q. 94. Did you ever have any conversation with Mr. Garvin respecting Quin-Coco?
A. Not that I can recall to my memory.
X Q. 95. Can you recall any conversation with Mr. Garvin respecting any specialty in your line?
A. Yes, sir.
X Q. 96. What specialty?
A. Guaiatonic.
X Q. 97. Any others?
A. Yes, sir, Tritica, and possibly others.
X Q. 98. But you don't recall *of* any conversation with reference to Quin-Coco?
A. No, sir.
200 X Q. 99. Which product is the largest seller—Guaiatonic or Quin-Coco in your territory?
A. The largest of the two you say? Well, I haven't the record at my command right now, but I think that I sell more of Guaiatonic than I do of Quin-Coco, of the two products.
X Q. 100. You would not be able to state positively as to this?
A. I couldn't say positively, but I think I sell more Guaiatonic.
X Q. 101. Which of the two products, Quin-Coco or Tritica, is the largest seller in your territory?

A. I don't remember, sir.

X Q. 102. Do you have a reasonably large sale of Quin-Coco the trade?

A. I can't say that I do.

X Q. 103. Do you sell a good deal of Tritica?

A. Well, I don't know. Well, it is a fair seller with me. I can say that it is the leading seller by any means of the specialties th I sell.

X Q. 104. To what other druggists in your territory have yo sold Quin-Coco besides Mr. Whitley?

A. Well, I couldn't recall to memory any particular druggist. have sold first one man and then another. I couldn't recall memory any particular name.

X Q. 105. How long have you been traveling this territory?

A. Eight years this coming March. The 23rd of next March will be eight years.

X Q. 106. Do you recall the names of any of the druggists i this territory to whom you have sold Quin-Coco?

A. In East Texas?

X Q. 107. Yes, sir.

A. Well, as I stated a moment ago, I can't recall to memory an particular one. I might name over several customers that I think I have sold.

201 X Q. 108. Are you willing to do so?

A. Well, I would not say that I have sold them, I would not say that I have positively sold them. I couldn't recall to memory every man I have sold Quin-Coco to.

X Q. 109. Have you finished your answer?

A. Yes, sir.

X Q. 110. I asked you if you were willing to name some of them.

A. I would be very willing indeed if I could recall any particular case.

X Q. 111. I understood in a former answer you said you could recall some that you think you have sold. I asked you if you would name these without stating positively that you have sold them?

A. The Harkrider Drug Company, Center, Texas; H. Y. Rogers, of the same City; Mr. J. C. Rogers, for another; Phelps-Hook Drug Company, Texarkana; Ringo Drug Company, Ringo, Louisiana, and others; I couldn't say how many more.

X Q. 112. What is your opinion of Mr. Whitley as a man and as a druggist?

A. For Mr. Whitley I have always entertained a very friendly feeling towards him. I consider him an honest man.

X Q. 113. Pretty good friend of yours?

A. Mr. Whitley has always seemed to be very friendly towards me.

X Q. 114. Is he a man you would trust?

A. Well, I would not care to answer that question. I might under certain conditions trust him. I think the question is a little personal.

X Q. 115. Have you known of Mr. Whitley representing anything to you falsely?

A. You mean telling me a falsehood?

X Q. 116. Yes.

A. I have no recollection of him ever telling me a falsehood.

202 X Q. 117. You usually found that what he has told you has been reliable, have you not?

A. Well, I would not say that I had or had not.

X Q. 118. Why can't you say that you have or have not?

A. Simply because I never had no occasion to give it a thought one way or the other particularly.

X Q. 119. What reason have you to doubt the truthfulness of what Mr. Whitley has testified to in this case?

A. What has he testified to?

X Q. 120. I ask you to answer my question without asking questions. Counsel for your house has already read you his testimony, or part of it.

A. You mean to question anything he has told me at all. You know what room I have to question anything he has ever told you.

X Q. 121. I would like you to answer my question as I propounded it.

A. Read the question.

(Question X Q. 119 read.)

A. I don't know of any particular reason.

X Q. 122. Did you ever represent to your customers that any of the products sold by you could be used by them as substitutes or replacers for the products of other houses?

A. Not knowingly.

X Q. 123. Do you think you ever have unknowingly?

A. It doesn't look to reason that I would.

X Q. 124. Do you show the product Quin-Coco to all of your customers?

A. Well, I don't know that I show it to all of them.

X Q. 125. Your territory is particularly good territory for the sale of this product, is it not?

A. Well, I couldn't say so; it is fair.

X Q. 126. Isn't it as a matter of fact one of the best sellers that you have in your line in your territory?

203 A. I don't consider it my best seller.

X Q. 127. I asked if it was one of the best?

A. Well, I can't say that it is.

X Q. 128. Isn't it one of the best sellers in the pharmaceutical line?

A. Amongst the pharmaceutical line?

X Q 129. Yes.

A. I couldn't say positively it is one of my best sellers.

X Q. 130. How many pharmaceuticals do you sell which you think exceed in sales the sales of Quin-Coco?

A. Well, I consider that I sell a number of them that will exceed the sale of the Quin-Coco. I am confident that I sell more Tono

Sumbol Cordial. I sell, I think, more Guaiatonic, more Tritica, a
I believe more Fernella. I think I sell more Fluid Viburnam Co
pound, and there may be a number of others; I couldn't say.

X Q. 13. Did Mr. Garvin ever give you any information respe
ing Fluid Viburnam preparation you have referred to?

Mr. Rawle: Objected to as not proper cross-examination and
irrelevant and going beyond the proper limit.

A. I don't remember. You mean to ask me if Mr. Garvin ev
gave me my instructions on Fluid Viburnam Compound?

X Q. 132. Yes.

A. I don't remember.

X Q. 133. In your direct testimony I understood you to say th
Mr. Whitley's deposition respecting your representations to him
not true, am I correct?

A. Well, I don't feel like it is true entirely.

X Q. 134. Is it in substance?

A. Well, there is a part there I don't think is true.

X Q. 135. When did you arrive in St. Louis for the purpose
testifying in this case?

204 A. Friday evening—pardon me—Saturday evening it w
when I arrived here.

X Q. 136. Since then how much time have you spent with th
officials of your house in the discussion of the testimony you woul
give in this case?

Mr. Rawle: The discussion with a witness of the matter he is e
pected to testify to, by counsel or client, is a perfectly proper an
recognized practice and I object to this question.

A. Very little, if any.

X Q. 137. With whom have you discussed the case since you hav
been in St. Louis?

A. Well, I have just merely spoke about it in a casual way wit
Mr. G. A. Pfeiffer.

X Q. 138. You mean the Mr. Pfeiffer who is present in the room

A. Yes, sir.

X Q. 139. And has been while you have been testifying?

A. Yes, sir.

X Q. 140. Also with Mr. Merner?

A. I don't think so.

Cross-examination closed at 11.27 A. M.

Deposition closed.

JAMES W. WILKINS.

STATE OF MISSOURI,
City of St. Louis, ss:

Sworn to before me on the 7th day of December, A. D. 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

205 B. F. JONES, a witness called by and on behalf of the defendant, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, residence and occupation?
A. B. F. Jones, New Orleans, Louisiana. I represent William R. Warner & Company as a traveling salesman; have been with them thirteen years. I went with them when it was the Pfeiffer Chemical Company. I began in the drug business in 1880. It is on my watch, the date. That is, the retail business at Winona, Mississippi, as a clerk in the employ of Ward & Vaughn at Winona, Mississippi. I worked there—I don't know exactly how many years I worked there, and in 1880 I went in business for myself with Jones & Watts at Winona as a retail druggist and stayed there two and one-half years in business. Then I went with Lyons Wholesale Drug House in New Orleans and stayed there three years, and then I went with Chamberlain Medicine Company, wholesale druggists in Des Moines, Iowa, and traveled for them in Mississippi, and then I went to Hance Brothers & White, of Philadelphia. I was with them seven years. Then I went to the Pfeiffer Chemical Company and have been there ever since as a traveling salesman. My territory is South Mississippi, South Louisiana and two or three towns in Alabama, also Mobile. I have Mobile and New Orleans; the territory has not changed much.
Q. 2. About how many retail druggists do you solicit in your territory?
A. I think about 500.
Q. 3. How often do you call on them a year about?
A. How often a year? Every three months; that is four times a year.

Q. 4. About what percentage of the doctors do you call on?
206 A. About one-sixth, dispensing doctors—no others.
Q. 5. About one-sixth?
A. Yes.
Q. 6. Do you push the sale of the entire Warner line?
A. I certainly do.
Q. 7. How many items are there, approximately, in it?
A. About three hundred, I guess, or three hundred and fifty.
Q. 8. I mean, how many items are there in the entire line of War-

ner Company and its other companies, including Pfeiffer Company and its other companies?

A. There is about three thousand.

Q. 9. State whether or not it is the object of your work to push the entire line or only a part of it?

A. I push the entire line from one end to the other.

Q. 10. State whether you constantly make any special effort to push any few products in that line?

A. I never specialize on one thing. I work from one end to the other. I have been complimented on that several times from the house.

Q. 11. In selling your goods which line do you start with?

A. Pfeiffer's line.

Q. 12. And then take which?

A. Perfumery line.

Q. 13. And then?

A. Pharmaceutical.

Q. 14. And after that.

A. Patent medicines.

Q. 15. State whether or not in doing this you go through your catalog?

A. From start to finish.

Q. 16. How good a seller is Quin-Coco in your territory?

A. Well, it sells fairly good. I have got a good many better ones.

Q. 17. On what calls over the counter can a druggist sell Quin-Coco?

207 A. He could sell Quin-Coco as we put it up in two-ounce bottles marked "Quin-Coco" over the counter, he could prescribe it, he could sell it for chocolate quinine, he could sell it for tasteless quinine, he could sell it as sweet quinine.

Q. 18. For what human ills is quinine a remedy?

A. Mostly malaria.

Q. 19. Anything else?

A. Fevers.

Q. 20. Anything else.

A. Chills and fevers and malaria and colds about covers it all.

Q. 21. How about sales over the counter to a customer complaining of being sick in various ways.

A. As I suggest to my customer: a lady comes in and says my child is sick, got a fever. The druggist prescribes for a great many of them. They go to work and give them a laxative and then give them Quin-Coco to cut the fever out. There is a great deal of counter prescribing.

Q. 22. State whether or not you have a regular method of procedure when you offer Quin-Coco for sale to a druggist?

A. Yes, sir.

Q. 23. What is it?

A. Well, I state to him,—I first show him the preparation and I tell him we have got the best preparation on the market in the way of chocolate quinine. I say, now, of course, when you get a prescription for Quin-Coco you can fill it or if you get a prescr-

tion for Coco-Quinine you can fill it. I don't suggest to you to substitute at all. There is plenty of cases you can use it without substitution, just in the way of selling it as chocolate quinine, tasteless quinine and sweet quinine and in counter prescribing. Then I tell him the price. It is a better price.

Q. 24. Speak of its qualities?

A. Yes, sir; I tell him how much sulphate quinine it
208 has in it, two grains to teaspoonful, don't nauseate, don't separate, don't ferment, don't sour,—a better proposition than any one I know of on the market. That is what I talk to them.

Q. 25. State how far this is your universal method of work?

A. Since I have been selling it.

Q. 26. If a druggist gets a prescription specifying a preparation of a particular make and fills it with a similar preparation made by a different maker, state whether or not, in your opinion, that is honest work?

A. I don't think that is honest; I know it ain't.

Q. 27. What would be your opinion of the honesty of a druggist who did that?

A. I don't think he would be honest in doing that. I don't preach substitution.

Q. 28. If a drug salesman should suggest to a druggist that he should do that sort of thing, what would be your opinion of the drug salesman?

A. He would not be honest either in that case.

Q. 29. Do you know a druggist named V. B. Richard?

A. Yes, sir; his drug store is at Jennings, Louisiana.

Q. 30. How long have you been soliciting his trade?

A. About twelve years.

Q. 31. V. B. Richard, when called as a witness for plaintiff, testified as follows:

"Q. 6. What representations were made to you by the representative of William R. Warner & Co. when your order was first solicited for this preparation? (Quin-Coco.)

A. He asked me if I handled much Coco-Quinine and said he had a preparation that he thought was better and asked me to get some of it and show it to my doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money
209 in it for me.

Q. 8. Was it understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. Yes."

Please state whether or not you in any interview gave him to understand that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. I did not.

Q. 32. V. B. Richard further testified as follows:

"X Q. 19. What do you mean by saying that it was understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. My attention was called to the preparation Quin-Coco by William R. Warner & Company's salesman and he told me it was very similar to Coco-Quinine which I saw it was. He didn't advise me to substitute it for Coco-Quinine; but said it could be done without detection."

State whether or not you stated to Richard that Quin-Coco could be substituted for Coco-Quinine without detection?

A. I did not, or any other man.

Q. 33. Did you ever deal with Charles Heno?

A. Yes, sir; Napoleonville, Louisiana.

Q. 34. Heno, when called as a witness for plaintiff, testified as follows:

"Q. 19. Have you ever been solicited by Mr. Jones or any one else to buy 'Quin-Coco' since that time?

A. Yes, sir.

Q. 20. Please explain when and what was said on such occasion?

A. Well, I don't remember exactly, but it was two or three months ago when Mr. Jones and a special representative of the laboratories, or one who represented himself as such, came on his regular
210 trip and offered the same products, and said they had been selling it all along as 'Coco-Quinine,' to be used as 'Coco-Quinine.'"

State whether or not this is true?

A. It is not.

Q. 35. Give your reason for saying so.

(Witness is handed Heno's testimony as quoted.)

A. We called on him and offered him the preparations in the usual way, went plumb through the book on the line. Mr. Ritayik was with me from the house when I called on him, but we never told him that we were selling it for Coco-Quinine, positively.

Q. 36. Do you know Wesley S. Ames?

A. Yes, sir; druggist at Laurel, Mississippi.

Q. 37. State whether or not you offered him any of your pharmaceutical lines?

A. I called on Mr. Ames when he first opened and sold him a bill of patents, and he told me himself he wasn't doing any pharmaceutical business. He had no prescription business, he had no doctor, and I then remarked to him I sold more pharmaceuticals than any man that came to Laurel, and when he did have prescription I would like to have the business, and he assured me he would give it to me. I never went over the line, never spoke of any one preparation. I told him I sold more pharmaceuticals than any other pharmaceutical man that came there.

Q. 38. State whether or not Quin-Coco is a pharmaceutical?

A. Yes, sir.

Q. 39. Did you ever at Laurel sell him any Quin-Coco?

A. I never sold him any pharmaceuticals at all. He had no doctor. He has no business now; he sold out.

Q. 40. Was Ames in the drug business at Hattiesburg?

211 A. Himself and brother had a store at Hattiesburg, and then he went to Laurel and opened a branch of this store.

Q. 41. Did you ever call on him at this Hattiesburg store?

A. Yes, sir.

Q. 42. Wesley S. Ames, when called as a witness for plaintiff, testified as follows:

"Q. 11. Have you ever been solicited to buy 'Quin-Coco,' and if so, on what representations?

A. 'Quin-Coco' has been offered to me for sale as a similar preparation to 'Coco-Quinine,' and I have been told that I could dispense it on calls for 'Coco-Quinine,' without detection, and that it was the same goods exactly. That's about the only representations I have had."

State whether or not this is true, and whether you said that?

A. I made no such statements to Mr. Ames or any one else.

Q. 43. Do you know Edwin R. Albright, and where is his place of business?

A. I do; Mobile, Alabama.

Q. 44. Albright, when called as a witness, testified as follows for plaintiff:

"Q. 12. Has it ('Quin-Coco') ever been offered to you for sale, and if so on what representations?

A. It has been offered to me as being the same as 'Coco-Quinine.' That's about all.

Q. 16. How was it expected you would sell 'Quin-Coco' when you receive no calls or prescriptions for it?

A. I don't know how he expected me to sell it other than use it for 'Coco-Quinine.'

Q. 17. Was that your understanding of the proposition?

A. I naturally understood it that way, when he told me 212 it was the same thing as 'Coco-Quinine.'"

State whether or not you ever made any proposition to Albright to buy the Quin-Coco and use it for Coco-Quinine?

A. I did not absolutely. I never offered him any pharmaceuticals whatever, because he had bought his opening bills from Mulford. I knew that and I worked the Pfeiffer line and patent line and perfumery line with him.

Q. 45. Do you know Charles A. Noiret?

A. I do; yes, sir. He is traveling salesman for Eli Lilly Company.

Q. 46. Since when?

A. October, I believe.

Q. 47. Formerly with whom?

A. Mulford,—H. K. Mulford.

Q. 48. When did he leave Mulford?

A. Last January, I believe.

Q. 49. Charles A. Noiret, when called as a witness for plaintiff, testified as follows:

"A. My attention was first called to the 'Quin-Coco' by Mr. Howard Smith, who represented the Pfeiffer Chemical Co. and Wm. R. Warner & Co. Mr. Howard Smith stated to me that 'Quin-Coco' was the same identical thing as 'Coco-Quinine,' as the chemist that formerly made the 'Coco-Quinine' for Lilly was now making it for Pfeiffer Chemical Co.; and in my presence, to the retail drug trade he advised them to buy it, in preference to the original of Lilly & Co., as it was cheaper and would answer the same purpose as the doctors could not detect the difference. Mr. Jones representing the Pfeiffer and Warner Companies in Alabama, told me the same thing."

State whether or not you made such a statement to Mr. Noiret, as I have read to you?

213 A. Never had any conversation with Mr. Noiret on Quin-Coco at all.

Q. 50. Noiret further states:

"Q. 8. Please state any specific instance, naming the time and place, if you remember, when Mr. Jones made such a statement to you as you have given in your last answer?

A. Mr. Jones stated the same to me at Meridian, Miss., in McCorkle's drug store, in the presence of Mr. McCorkle about two years ago. I used to meet him on the road every week or so. We traveled the same territory. I have heard him make the same statement frequently in different drug stores at different times."

What have you to say as to this statement by Noiret?

A. I will state that I never met Mr. Noiret in Mr. Williams' store in Hattiesburg, nor did I meet him in Laurel in Johnson's store. I met Mr. Noiret in McCorkle's store in March on a Sunday morning and we had a cigar together and there was nothing said in regard to pharmaceuticals, Quin-Coco or anything else. I never had much to do with Mr. Noiret.

Q. 51. State whether or not you met Noiret and made any such statements to him in Johnson's drug store in Laurel, or Williams' pharmacy at Hattiesburg, Miss.?

A. I did not.

Q. 52. Noiret further testified:

"Q. 12. What have you heard Mr. Jones say to any druggist as to how he could dispense 'Quin-Coco'?

A. Mr. Jones mentioned to the druggist that when he received a prescription for 'Coco-Quinine' he could use 'Quin-Coco' and it could not be detected and it was cheaper to use 'Quin-Coco' than it was to use 'Coco-Quinine.'

Q. 13. These statements were made by both Mr. Smith

214 and Mr. Jones to the druggists at the stores above mentioned?

A. Yes, sir. In my presence and also the presence of the druggist."

What have you to say to this testimony of Mr. Noiret?

A. I will state that I never sold a bill in the presence of Mr. Noiret to any one of those people, or any other. It is my policy never to butt in on anybody and I never allow anybody to butt in on me when I am selling a bill.

Q. 53. Will you state whether or not in your experience in the drug business as a salesman, you ever have had personal knowledge of a druggist substituting?

A. No, sir.

Q. 54. Have you always as a salesman had a copy in your possession of Warner's "Confidential"?

A. Yes, sir.

Q. 55. State how far you have followed the policy of the house in selling as a traveling salesman for it?

A. I follow it from the word "A" to the word "Z." They always taught me to sell goods without any misrepresentation, and I tried to follow it to the letter. They always told me if I can't get an order in a straight way, never to do it in any other way. I have always been told that since I was with the Pfeiffer Chemical Company and I have followed it to the letter, and to show that I have, I have been in the territory a good while and still doing business.

Q. 56. One of the rules in the "Confidential" relates to not mentioning the name of a competitor in trying to sell goods in a competing line. What is your practice in regard to this rule?

A. I have always too much to do with my own line to mention a competitor, to talk about them. I invariably make it a rule to talk about my stuff.

Q. 57. You have been a retail druggist and drug salesman. State whether or not, in your opinion, a retail druggist can by special efforts push the sale of a given preparation and create a market for it?

215

Mr. Bradford: Objected to as irrelevant, immaterial and incompetent.

A. Yes, sir.

Q. 58. How?

A. By counter prescribing, you know. By seeing his doctor. He can work in conjunction with his doctor. The doctor and him are generally good friends, and he can say to him, here are the things I want to get rid of and want you to prescribe, and they work those things that way.

Q. 59. By counter prescribing what do you mean?

A. Counter prescribing. For instance, a patient comes in and says, I have a cold and my liver is out of order, and he prescribes for him; that is counter prescribing. He can get rid of Quin-Coco that way.

Direct examination closed.

termed them, eroded crystals of quinine sulphate as he found them in samples Nos. 7 and 8, and comment thereon, expressing your opinion as to the value of this evidence?

A. I can not see how any one experienced in microscopic work could interpret the phenomena I have referred to, namely the coating or enveloping of the crystals, particularly at the ends, with the transformation substance, as being due to eroded or bone-shaped crystals. I can see that an unskilled observer might not distinguish between the two elements, namely, the crystals proper and the yellow, oily substance, which gives the peculiar appearance in samples Nos. 7 and 8. It is still more inexplicable how a microscopist could state that in No. 10 all the crystals had gone into solution, when as a matter of fact they had merely gone into this oily transformation product and there is no evidence whatever that a greater amount has gone into solution than already existed before the changes.

Q32. I call your attention to Dr. Beringer's answer to Qs. 40 and 41 respecting Specimen No. 4 and ask you to express your opinion respecting the correctness of his conclusions as there stated, bearing in mind particularly what he has said about his microscopic examination and also what he says in answer to Q41 about the cafe-tannic acid?

A. He states this showed some precipitation on the bottle, still evidenced on the sides of the bottle and bottom, poured like mucilage, having the flavor and characteristics of dextrine. I failed to note any such precipitation myself, the sample being remarkably homogeneous. And I am quite unacquainted with dextrine that precipitates in such a manner. I am at a loss to know how the flavor of such a precipitate could be determined when I have been unable to note even a separation. Furthermore it is hard to understand how such a substance could be identified as dextrine by its taste even if secured in the form of a precipitate from

a preparation so highly flavored with other constituents. Dextrine is practically a tasteless substance and its characteristics even when separated in pure form could be determined only by a skilled chemist. It has practically no flavor. It does have certain polariscopic and other physical as well as chemical characteristics belonging to this carbohydrate. He further states "The slight flavor of coffee which was first perceptible was soon drowned out by the extreme bitterness of the quinine."

I have already testified that this is one of the Bibbins samples which was quite as bitterless as Coco-Quinine. I would not call any of these Bibbins samples extremely bitter. I would however call a sample of suspended quinine sulphate in a chocolate saccharine medium which was submitted to me, such as Complainant's Exhibit Bottle No. 2, extremely bitter. I tasted that sample and for some time afterward suffered excruciating torment, showing that the nerves of my mouth are quite susceptible to such an intense bitter. He refers in the next sentence to the broken down and eroded quinine crystals. This point I have already considered. In this sample I saw no change whatever in the quinine crystals. In only four out of the ten Bibbins samples was the quinine abnormal and showed any change. He states further that "the solution gave a distinct reaction with litmus paper, a distinct acid reaction". As to this point we are all agreed. In reference to the statement "there was likewise in the microscopic fields starch grains partly altered and distributed unevenly throughout the field" I will say that if such starch grains were present they escaped my notice. Dextrine does sometimes contain unaltered starch grains but they were not present in sufficient numbers in this case to attract my attention, and have no bearing on the points in question. He states "coffee contains cafe-tannic acid, which precipitated out part of the quinine, and I have

no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate so that the quinine was subject to reactions in two different directions by this precipitation." In this statement he merelyexpresses a theory but gives no evidence whatever of an experimental nature. Even if the quinine is partly precipitated as tannate, I fail to find any detriment in the change, but on the contrary a distinct advantage as a portion that was in solution would be in an insoluble form. It might here be stated that cocoa as well as coffee is a carrier of tannin, cocoa red, a member of the tannin group, tannin and tannic acid being used synonymously, is present in the cocoa bean to the extent of four to seven per cent., and the precipitation of tannate is quite as probable in the cocoa preparations containing a very considerable amount of cocoa as in this preparation flavored with a small amount of coffee extract.

Q33. Will you please take up Dr. Beringer's answer to Q44 respecting Specimen No. 5 and state your opinion and conclusions on the subjects there discussed?

A. He states "There was decided evidence of precipitation on the sides of the bottle, still showing". I noted no precipitation. He then states "The taste was decidedly bitter and it gave a decided acid reaction with litmus paper and the crystals of quinine sulphate, when examined under the microscope, were distinctly eroded and attacked, and there was likewise separation of quince seed mucilage, showing as I have sketched here the characters of quince mucilage as separated in these specimens (referring to sketch in the witness' hands)". With regard to the alleged bitter taste, No. 5 in my test was quite as bitterless as Coco-Quinine. It was no more acid than Coco-Quinine by the litmus paper test. The crystals of quinine sulphate in my examination were not eroded or attacked, they were normal in appearance.

Q34. Will you please refer to Dr. Beringer's answer to Q59 respecting Bibbins Specimen No. 6. In this answer he stated "under the microscope the crystals of quinine sulphate showed that they were acted upon and eroded and that they separated the Irish moss, jelly and quince seed mucilage in different masses. That this was apparent on the surface of the glass bottle as well as under the microscope. He stated further "In the sketch I have shown (Beringer's sketch) the typical separation of the Irish moss jelly as occurred in this specimen No. 6, and likewise the mucilage of quince-seed, as separated. These separations were unequally distributed throughout the field showing the lack of homogeneous suspension". In connection with this answer as well as his answer respecting Sample No. 5, I ask you to consider his sketch and express your views respecting the same and his conclusions.

A. With reference to the crystals of quinine sulphate I must disagree absolutely with Dr. Beringer. My examination failed to disclose any erosion or any abnormal appearance of the crystals. The preparation is as bitterless as Coco-Quinine. He refers to the separation of the Irish moss jelly and the quince seed mucilage jelly and his illustration of this alleged quince mucilage and Irish moss jelly. The mucilage separated from Irish moss and from quince seed goes into a form of colloidal solution. It is formed by the vegetable cells but on solution in water and straining severs its connection with the organized tissues. If it is precipitated from this colloidal solution, it is a most remarkable phenomena if once again it assumes cellular form. Such a statement is absurd in the highest degree, against all laws of biology or cell formation. The quince seed has an interesting cellular structure corresponding closely to the allied seeds of the apple and pear. There are several distinctive layers which have been carefully studied and to which I have myself

before considering this case or before knowing of this case, studied in detail. There is no structure in the quince seed that corresponds with Dr. Beringer's drawing marked "quince mucilage", and even if there were such a structure I can not comprehend how it would find its way into the quince mucilage in the form of a solution and then be precipitated. The case is somewhat different with Irish moss. This breaks up in the treatment and some of the cells might pass through into the colloidal solution although the cellular matter is removed in making such a solution as completely as possible. If Dr. Beringer found under the microscope any cellular structure such as he marks "quince mucilage" it must have come from the Irish moss although from the picture it might be anything, as it bears the closest resemblance to ciphers arranged in nine rows. His drawing marked "Irish moss jelly" may represent solid particles of the Irish moss which quite posibly found their way in small amount into the preparation. Such being the case it is obviously unfair to make a microscopic picture of the cellular elements, magnified several hundred diameter to illustrate the lack of uniformity of the sample when thousands of such particles equally large or larger can be found under the microscope in Coco-Quinine or Quin-Coco and yet these particles do not interfere in the slightest with the even distribution of the quinine sulphate after reasonable shaking. And in the case of Bibbins sample No. 6 on standing a considerable time, five weeks in fact, without shaking, would also be no detriment and not interfere with the proper dispensing or administering the mixture even without shaking.

Of all the preparations which I have examined, Coco-Quinine and Quin-Coco are the ones that abound in solid particles of cellular matter, whereas in his samples Bibbins employed as thickening or suspending media substances containing little and in some cases no cellular matter. To the naked eye one can see par-

ticles in the cocoa preparations quite as distinctly if not more so than in the Bibbins samples.

Q35. What special experience have you had with or what personal study have you given to the quince seed problem referred to in your answer?

A. In my book on the Microscopy of Food I give a somewhat extensive account of the microscopic structure of the quince seed on page 331 of the second edition.

Q36. In answer to XQ224 Dr. Beringer testifies that in chocolate there is an astringent principle which is classified in tannins. "In my opinion the trace of the tannin like principle present in the commercial cocoas and chocolate is due largely to the admixture of portions of the shells which may be accidentally or otherwise present. In that hull you have a tannic acid principle. It is like a peanut. You take a peanut and in the skin coating there will be tannin, and in the outer shell coating there is some more." What have you to say as to this?

A. Dr. Beringer is correct in his statement that in chocolate there is an astringent principle which is classified with the tannins. In cocoa there is still more than in chocolate, because cocoa is merely chocolate from which a portion of the fat or cocoa butter has been pressed out, thereby increasing the percentage of the other constituents. The statement that in his opinion the trace of the tannin like principle present in the commercial cocoas or chocolates is due largely to the admixture of portions of the shell which may be accidentally or otherwise present is contrary to the well known structure of the cocoa bean, commercial practice and recorded chemical analyses of the products. This statement shows an absolute lack of knowledge of the microscopic structure of the cocoa bean, equal lack of knowledge of the chemical composition of the cocoa bean and cocoa products and a gross injustice to manufacturers of cocoa as well as a possible suggestion of

the grossest neglect on the part of the administrators of the food and drugs act, who would allow cocoa shells to be used in cocoa to such an extent as to give several per cent. of tannin substances. The structure of the cocoa bean is shown on page 445 of the second edition of the Microscopy of Foods, Fig. 348. This figure is a cross section through the shelled cocoa bean or cocoa nib. The cocoa bean is somewhat larger than and about the same size as an ordinary lima bean and is similar to the lima bean (although botanically not at all related), in that it consists in large part of fleshy seed leaves enclosed within a rather thin membraneous skin. Figure 348 referred to is a cross section through one of these seed leaves corresponding to the part of the lima bean which comes up out of the ground in the spring. It shows cells containing starch grains and among these starch three cells of dark color known as the pigment or tannin cells. These three black cells contain tannin or tannic acid, as their chief and characteristic constituent and it is from these cells that the cocoa derives its considerable percentage of tannin. The cocoa shells do not contain tannin in such large amount. They do not find their way into cocoa as the shells are removed in the process of manufacture. So it is obvious that the statement of Dr. Beringer that the tannin of cocoa is due largely to the admixture of portions of the shell is grossly false and misleading. On page 443 of the work cited is the following statement:

> "Over fifty per cent. of the dry embryo consists of fat, the remaining constituents being starch, proteids, theobromine, caffein, a tannin substance known as cooca red, and other substances in small amounts."

Tannin is not an accidental or a minor constituent of the cocoa bean. It is one of the chief constituents and a highly characteristic constituent, both as to its chemical properties, its color and its taste. He states that it

is like a peanut. I can not imagine any common product more unlike a peanut than the cocoa bean in its gross appearance, in its structure, and in many other details. He refers to the tannin in the skin of a peanut and to the tannin in the outer shell coating and in the outer shell, three distinct formations outside of the kernel proper, while I myself after a study covering some weeks never found but two, the red skin and the shell. The statements with regard to the tannin in these three parts of the peanut are not supported by analyses either of his own or of others.

Q37. How extensive has been your study of the cocoa bean and cocoa products?

A. During the years 1902 and 1903 while I was connected with the Connecticut Agricultural Station with the help of two assistants, I made somewhat extensive investigations of the composition of the cocoa bean as secured direct from the importer and ground in the laboratory. This work was the basis for the standards for the composition of cocoa and chocolate promulgated by the United States Department of Agriculture. The methods used or elaborated in this work were for the most part adopted by the Association of Official Agricultural Chemists. In addition somewhat extensive analyses were made of commercial chocolates and cocoas. I submit the report of the station named for 1902 and refer to pages 258 and 259 showing analyses of commercial cocoa. Analyses of the authentic samples to which mention has been made are found on subsequent pages, but in this connection are not of so much interest as those on pages 258 and 259, which are of cocoa such as might be used in the preparation of Coco-Quinine although attention should be called to the fact that in the preparation of this drug product as well as of soda water syrup a cocoa would doubtless be selected containing the minimum amount of fat and correspondingly larger amount of other constituents. In the analyses of cocoa referred to, the range of starch (pure

Indianaoplis, Ind., December 5, 1917, 9 A. M.

Met pursuant to adjournment.

Parties present as before.

Q40. I call your attention to Dr. Beringer's answer to XQs. 212, 213 and 214, and ask you to express your views respecting the subject matter there inquired about and whether or not you agree with Dr. Beringer?

A. The term "peculiar" as used by Dr. Beringer seems to be most unfortunate. Had he said "characteristic" I would agree with him. I find nothing peculiar about cocoa starch, at least more peculiar than of any other starch. The form, size, and other visual characters of the starch grains from different vegetable products differ greatly, so that with the microscope these different starches may be distinguished. In chemical composition the starch in different products agree. We have no evidence that the starch of cocoa is any different from the starch of Indian corn, the potato, the bean, and so on, although different in form. Dr. Beringer states they vary in the character of their coating. I do not understand what he means by "coating," but I will say that I have never heard of a coating of starch grains. It is true that the grains show a concentric structure, as exhibited under the microscope. We note more or less distinct concentric rings, but this structure is not considered to mean a difference in chemical composition other than possibly a variation in the moisture contents. On treatment with reagents starch grains show certain peculiarities, but these are not to my knowledge of the nature of coatings.

He states that it is a mooted question whether the different starches have the same chemical composition, but adds that it is commonly considered that they are chemically of the same composition. While modern research shows that perhaps the true formula for starch is some multiple of the figures given in the common formula $C_6H_{10}O_5$. I know of no evidence whatever that this differs in the starch from different sources.

To sum up, starch is considered to have the same chemical composition regardless of its source; but the granules differ in form in different plants.

Q41. I call your attention to Dr. Beringer's answer to XQ122, respecting suspending mediums and call your attention to what he said about chocolate as a suspending medium, and ask your opinion of this same subject matter?

A. Basing my answer on my own examination of the Bibbins samples, Coco-Quinine and Quin-Coco, I will say that cocoa, which I assume is what Dr. Beringer means by chocolate, is not as good a suspending medium as gelatin, Irish moss, dextrine. It is true that chocolate, or rather cocoa, on boiling with water gelatinizes to a certain extent, and therefore becomes more or less of a colloidal nature, but this is attributable to the starch of the cocoa, and such being the case there is no reason to conclude that cocoa serves the purpose in a way that nothing else so far suggested does. As a matter of fact, cocoa owes its suspending power after boiling with water to starch. This I have shown to be true by a very simple experiment. I mixed a teaspoonful of cocoa with a half of cup of cold water, transferred the mixture to a bottle. I then mixed another teaspoonful of cocoa with half a cup of water and brought the mixture to a boil with constant stirring, boiled for a few minutes, then transferred to a bottle as in the case of the unboiled mixture. The boiling was not continued long enough to decrease the volume through evaporation. Both the boiled and the unboiled prep-

arations were thoroughly shaken and allowed to stand undisturbed. After a time the cocoa in the unboiled preparation settled out, forming a distinct layer, that is, the insoluble portions of the cocoa; small quantities may have gone into solution. From the boiled preparation the cocoa also settled out after a time, but in a much more bulky condition. It occupied several times the bulk, as in the unboiled preparation. The boiling performed one function, namely, the gelatinization of the starch, that is, the conversion of this constituent into the pasty condition with the water. And this change accounts for the change noted.

I know of no other constituent of cocoa than starch which gives this condition—that goes into colloidal solution and thereby imparts to the preparation suspending power. In my opinion starch by itself used in the same quantity present in the cocoa is superior as a suspending agent to cocoa containing that amount of starch. In the cocoa the starch after its gelatinization, in the case of quinine preparations, not only has the task of suspending the quinine crystals, but it must also suspend the solid insoluble portion of the cocoa itself. In other words, while the cocoa contains a suspending gelatinizing material it also contains materials that must themselves be suspended.

Q42. I ask you to refer to Dr. Beringer's answers to XQs. 134, 135 and 136 and 137, and express your opinion on the subjects there inquired about very briefly. You have already covered the subject matter very thoroughly, and I only ask now for brief comments directed to these particular answers?

A. It appears to me that Dr. Beringer uses a great many words to describe a very simple phenomenon, but that he evades the true explanation of the suspending power of cocoa. He states in answer to the question, "How does chocolate suspend quinine," that this is "by virtue of the constituents of chocolate", that "it has the property of making a mixture that will hold

up, distributed throughout it, or in suspending the quinine sulphate". I can not understand why he did not state that this is due to the starch in the cocoa. He evades a simple explanation.

Q43. Dr. Beringer stated in answer to XQ159 respecting Bibbins Sample No. 2, that it was decidedly more bitter than Coco-Quinine. What have you to say as to this?

A. I did not find it so. I found it delicious, quite as bitterless as Coco-Quinine.

Q44. In answer to XQ174, Dr. Beringer stated that he could distinguish the mucilage of quince seed from the mucilage of Irish moss under the microscope. In XQ175 he was asked in what way. He replied: "Irish moss is larger and more gelatinous and gluey in character." What have you to say as to this?

A. I will say that I am unable in a gelatinized form to distinguish these products. I do not believe it can be done, although it is well known that the Irish moss itself has microscopic appearances quite distinct from those of the quince seed. I refer to the cellular elements which do not go into colloidal solution. The quince seed tissues I was unable to find in any of these preparations.

Q45. Do you believe it is possible to distinguish under the microscope quince seed mucilage, tragacanth, Irish moss jelly tolu and gelatin, as found in these Bibbins samples and identify each?

A. I do not believe it is possible. I would not attempt it.

Q46. I ask your attention to the answer of Dr. Beringer to Qs. 86 and 87 and XQ206, respecting the colorings used, with special reference to what he says about coal tar dyes, and ask for your opinion of his testimony and your own opinion respecting the subject matter inquired about?

A. With regard to his statement that the coal tar dyes are susceptible to occasional precipitation and

that he suspects that some of the specimens which show precipitation owe this in a measure to the artificial coloring, I will say that the amount of coloring used was so minute that if precipitated it could not be detected by ordinary means in a colloidal solution, such as exists in the Bibbins samples. Even if precipitated I fail to see any disadvantage, as the whole purpose of the coloring is to please the eye, and the eye shows in all of these samples an even distribution of color.

As regards the therapeutic action of dyes his reference to Allen seems to me grossly unfair and misleading. Allen does state, and every food chemist knows, that napthol yellow is a poisonous dye. Napthol yellow S, however, is recognized as a harmless color and its use is sanctioned by the United States Government, it being one of the eight colors allowed by regulation of the United States Department of Agriculture. To insinuate that napthol yellow S, which was used in at least one of the Bibbins samples, may be harmful because napthol yellow is known to be harmful, is unfair as to insinuate that common salt is injurious to health because muriatic acid and caustic soda, which, together in the proper amount, form common salt, are highly corrosive substances.

I might cite numerous cases where napthol yellow has been shown to be a poison. While I was in charge of the Chicago laboratory in the enforcement of the Foods and Drugs Act, we seized and finally by condemnation of the Court destroyed several carloads of macaroni colored with napthol yellow, yet at that time the Government was sanctioning the use of napthol yellow S as a coloring, under suitable regulations to avoid deception.

If coloring matter is to be allowed in foods and drugs I believe that carefully selected coal tar colors inocuous in themselves and free from poisoning contamination, are more likely to be unobjectionable from a sanitary standpoint than so-called natural colors, such

as cudbear, prepared from sea mosses, and cochineal, a disgusting bug, which come from regions where sanitary precautions are not taken, and where they are handled by natives under filthy conditions.

Q47. In XQ187 Dr. Beringer was asked how he determined the unevenness in the different fields by his microscopic examination. He answered: "Under the same magnification we would have naturally the same number of quinine crystals." He was then asked if he counted the quinine crystals in the respective fields, and he answered that he did in some of them. What have you to say as to this?

A. I will say that the mere counting of quinine crystals in a field is of little or no use, for the reason that the crystals vary greatly in size. Some of them being ten, twenty, and perhaps a hundred times larger than others. If an experienced microscopist expressed his judgment on the matter I would consider the results of some value, although the microscope in the case of a solid material, such as quinine crystals, where the individuals vary greatly, cannot be used in a strictly quantitative way. In such preparations as blood, where the size of the corpuscles is quite uniform, counting is a valuable quantitative test.

Q48. In your experience as a chemist have you ever understood that it was a well known fact that mixtures of oil become rancid much more quickly than pure oils themselves?

A. I have never noted the fact, nor had I ever heard of it until I came into this case.

Q49. I ask you to refer to Dr. Beringer's answer to Q85, the last paragraph of his answer, and note what he says respecting benzaldehyde as a flavoring, and comment thereon and express your opinion of the subject inquired about?

A. Benzaldehyde is a very popular flavor. It is the flavor of the so-called maraschino cherries. It is the chief flavor constituent of bitter almond oil, highly prized for culinary use in this country and especially

in England. I have never heard that it is objectionable because it loses its flavor by reduction to benzoic acid. Dr. Beringer states that it is apt to be oxidized, being reduced to benzoic acid. Oxidization and reduction are diametrically opposite chemical processes. Even if a portion of the benzaldehyde were oxidized to benzoic acid, such benzoic acid would be no detriment in preparations such as we are considering, as it would act as a preservative.

Q50. In answer to XQ191 Dr. Beringer stated that in a number of examinations that he had made he found quinine sulphate equally and thoroughly distributed. In answer to XQ201, wherein he was asked whether after a bottle of Coco-Quinine had been standing a long time would there be any difference in the quinine contents at the top and the bottom, he answered: "I have not made such a determination." What do you understand by his answers to these respective questions?

A. These two answers are not in harmony. It would be impossible to show a uniform distribution of the crystals without a microscopic examination of the top and the bottom of the bottle. Dr. Beringer says in answer to XQ191, that there appears to be a uniform distribution, but in answer to XQ201 he states that he made no determination after standing for a long time. It may be that in answer to XQ191 he had in mind an even distribution immediately after shaking, but judging from his previous testimony it has been my understanding that he insisted that a suspending medium to be satisfactory must hold up the crystals for a long time.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ51. I think you said that the litmus determination of acidity was not quantitative. Is that correct?

A. Using litmus paper as a test of acidity is not quantitative.

XQ52. Is that absolutely true in your opinion, or only to a modified extent?

A. It is true that a very faint degree of acidity with blue litmus paper would not become as red as when a medium or large amount was present, but beyond that small degree of acidity you get no indication from the litmus paper as to the amount present. You could not tell, for example, whether there was 1 per cent. or 30 per cent. of acid present by the degree of color.

XQ53. When saying that the litmus determination of acidity is not quantitative, I take it that you mean that it furnishes no method by which an accurate determination or a scientific determination of the acidity present can be made?

A. It is not even approximate. To explain, vinegar makers have rough, or approximate, methods of determining the acidity of their products, which methods are quantitative, although not accurate to such a high degree as the methods used in the chemical laboratory, but no vinegar maker would think of using litmus paper to determine the strength of his vinegar. With it he could not tell whether his vinegar contained half a per cent., 5 per cent. or 10 per cent. of acid. I refer, of course, to dipping the litmus paper into the product and not to using the litmus paper in conjunction with other reagents. Used in such latter way litmus paper may become a part of a strictly accurate determination.

XQ54. Suppose you took up the ten Bibbins exhibits the first time, ignorant of their contents, and tested them by simply placing litmus paper in each bottle, do you mean to say that you would get absolutely no information from such action as to comparative acidity of the material in the ten bottles?

A. I mean to say that I did test all ten bottles with litmus paper, and the only information I got was that the products were distinctly acid, and I got this

same information when I dipped the litmus paper into the cocoa preparations of the two manufacturers; that no difference in acidity could be detected between the Bibbins samples and the cocoa preparations by this test. I made the tests independent of any knowledge of the constituents.

XQ55. I understand that you made no quantitative test of acidity of the Bibbins samples other than the litmus test so far as that threw any light on the subject?

A. I made no quantitative tests for acidity. I made the litmus test, which is not quantitative.

XQ56. Is there any sense in which you call yourself a pharmacist?

A. No, sir.

XQ57. Has your professional work been more along the line of foods or drugs?

A. More along the line of foods.

XQ58. And very much more?

A. Very much more.

XQ59. This question of human tasting and of detecting by the gustatory organs of the mouth the presence of some particular article by its taste—does not this human sense of taste differ enormously in different people, just as sight or hearing do?

A. It differs somewhat.

XQ60. Would you not use a stronger word than "somewhat"?

A. I am not qualifying as a medical man, but in my understanding the sense of taste does not differ so much as the sense of sight or hearing. I know of people who are stone blind and absolutely deaf, but I do not happen to know of any one who cannot taste.

XQ61. Is tasting at all a matter of training in any given individual. I mean the accurate sense of taste?

A. It is well known that wine fasters and tea tasters develop their faculty of taste in a high degree. So far as I know.

XQ62. Then your answer to my question is yes, and what you actually answered was explanatory. Is that correct?

A. I would hardly like to answer the question yes, for fear that I might not understand your meaning. I explained what my understanding was of cultivated sense of taste. I wish to add that these trained tasters are distinguishing between products of different degrees of excellence, not between products that are absolutely nauseating, bitter, and products which are delicious.

XQ63. Would you say that your professional life and daily work constantly called for the exercise for the sense of taste in a practical way from various chemical or other substances?

A. The chemist is taught early in life to be a taster. The sense of taste and smell are continually used in the chemical laboratory and especially in food examinations. I will state, however, in this case, one does not need to become skilled as a taster any more than one needs to become skilled in detecting the difference between good tasting food and poor tasting food.

XQ64. But you have assumed in this case to pass upon the degree of bitterness in the various compounds you have handled here? That is, in a more or less quantitative way. How far does that not imply an assumption on your part that your palate is a more or less trained palate to detect differences in bitterness, for instance?

A. I did not assume that my palate was especially trained. The patient who would take these preparations as drugs would not have specially trained palates, and I expressed my judgment, putting myself in the position of the patient.

XQ65. That is you became the sick child in place of the expert chemist. Is that correct?

A. I did not put myself in the position of the child,

but of an intelligent person who has a palate who can tell the difference between what is good and what is distasteful.

XQ66. Do you know personally, where is the seat of your strongest sense of taste?

A. I am not a physiologist, and I have never thought of that point. Products taste, for example, bitter or not bitter to me, and I do not attempt to locate the nerves.

XQ67. But is it on the tip of your tongue?

A. That I could not say.

XQ68. If you were now asked to taste one of these Bibbin samples in order to testify as to what you tasted in it, would you take a drop or a spoonful, or what portion?

A. I would take different quantities, and repeat the test several times, taking care that the bitter taste of one sample held over did not mislead my judgment in regard to another sample.

XQ69. Will you not answer my last question a little more closely than you have.

A. I would take several days for the test. I could not do it all at one sitting, because after tasting one bitter sample my sense of taste would be ruined for testing those that were not bitter. I would say that a teaspoonful appears to me to be a large quantity to use. I believe a somewhat smaller amount would answer, because in my experience in tasting the cocoa preparations I found I could form as good a judgment from say a quarter of a teaspoonful as a whole teaspoonful.

XQ70. Have you any knowledge as to what the popular flavoring substances are in drug business and in the candy business?

A. I have the knowledge that several flavors are very popular in the candy business, and I also have some knowledge as to the flavors which are used in drugs.

XQ71. Would you be testifying, professionally I

mean, on the latter subject if I examined you or would you only speak from such general knowledge that a great many people have unprofessionally?

A. I would not be testifying from the standpoint of a physician or a pharmacist or pharmaceutical manufacturer.

XQ72. Referring to your answer to Q36 on the subject of the presence in commercial cocoa of particles of shell and the consequent presence of such particles in the preparations before us or some of them, is it not a fact that Dr. Beringer has testified that the amount if any of such shells in any one of these preparations is extremely minute?

A. I can only refer you to the official record.

XQ73. Would you venture to say as your opinion that commercial cocoas or chocolates contain or usually contain no portions of the shell of the article?

A. They might contain minute portions, but any considerable portion which would, of course, constitute an adulteration is rarely or if ever present at the present time in commercial cocoa.

XQ74. Is every bag of cocoa tested by the Government?

A. No, sir.

XQ75. How could its presence in minute or even small quantities of the shell be likely to be found out except by the user?

A. The user would not be able to find it out, anything like as readily as the trained Government examiner and expert, who has at his command chemical and microscopical methods.

XQ76. But don't you see that you have just said that the Government does not interest itself in every bag of cocoa?

A. Certainly not, but the Government does exercise a rigid inspection of the product, the Government inspectors having access to the factories at all times and Government chemists and microscopists being con-

tinually engaged in the examination of samples taken here and there in the market. Of course, no system of inspection of any kind is an absolute safeguard against fraud, but I fail to see how even if fraud were practiced by the addition of shells to the cocoa furnished to either of the houses in this litigation would alter my general contention that the seat of the tannin in cocoa is the cocoa nib, the part of the cocoa bean legitimately used in the manufacture of cocoa, and not in the shell, which might in minute quantities accidentally be introduced into the product, although the shell might contain a small percentage of tannin.

XQ77. Then you severely criticise Dr. Beringer for holding to the opinion that some commercial cocoa may have in it some particles of shell of the cocoa bean?

A. I criticize him for attributing to a highly improbable form of contamination the presence of a substance, to wit, tannin, which is normally present as one of the important constituents of the pure unadulterated product.

XQ78. You have stated that some of the crystals of quinine sulphate in one or more of the ten Bibbins samples appeared in the microscope to have changed to an oily compound, or to have gone into an oily condition. How did you ascertain that this condition was "oily"?

A. When I said "oily" I meant deported itself like an oil, being in a liquid condition insoluble in the menstrum. I do not wish to say that it has the composition of any kind of an oil.

XQ79. And you made no attempt to identify the substance?

A. That would be a long and difficult undertaking, but I will say that the observations I made were such as might lead an organic chemist into an exceedingly interesting field.

XQ80. Did you observe any such change in the quinine sulphate crystals in Coco-Quinine or Quin-Coco?

A. I did not.

XQ81. Would you consider a product in which such changes had taken place to be a suitable product for commercial use in the drug business? Without further investigation at least?

A. I think that is a pharmaceutical question.

XQ82. But you would at least admit that seeing such changes, that something had gone wrong with the preparation, would you not?

A. That, coupled with the bitter taste.

XQ83. Did you form an estimate in your mind of the number of crystals in the several layers which you found in the Bibbins specimens when examined under the microscope?

A. I formed no quantitative estimate. I did reach the conclusion that the appearance at the top and the bottom of the bottle was not disinguishable, I mean in respect of crystals, except in one instance, where I noted that the crystals were small at the top. I did, however, in the Coco-Quinine and Quin-Coco specimens on standing find a marked distinction in the number or rather quantity of the crystals at the top and at the bottom of the bottle. Mere numbers of crystals does not tell the story. It is merely a judgment based on all the characters involved as to the quantity suspended in the top or in the bottom of the bottle.

Re-direct-examination.

By Mr. Bradford:

RDQ84. In one of your answers to a cross-question you stated that litmus paper might be used as a part of a method to determine accurately quantitative acidity in a preparation. Was such a method employed by Dr. Beringer as explained by him in answer to Q8 of his deposition?

A. It was not.

RDQ85. You have stated that your work has been more largely with foods than with drugs. Do or do not

many of the same constituents enter into the manufacture of foods and drugs?

A. The two subjects overlap. For example, in the products in question, cocoa, sugar, the different flavoring constituents, such as ginger, peppermint, sassafras, wintergreen, orange and benzaldehyde, are well known food constituents.

RDQ86. And your testimony in this case has been with subjects that you are entirely familiar with and in a number of instances have made the subject of a number of experiments and investigations?

A. That is true.

Deposition closed.

ANDREW L. WINTON.

FRANCIS E. BIBBINS, being recalled as a witness for plaintiff, in answer to interrogatories propounded to him by counsel, testifies as follows:

By MR. BRADFORD:

Q1. Dr. Winton in his testimony has referred to certain bottles of syrups which he testified he received from you. Among others, a bottle partially filled with Quin-Coco, marked No. 8. I ask if you recognize this bottle and can identify it, and if so, where you obtained it and what condition it was in when you obtained it and the circumstances under which you gave it to Dr. Winton, if you gave it to him?

A. This sample No. 8 was received by me in an unbroken package through the receiving department of Eli Lilly & Co. It was delivered to me with the parchment wrapping intact, and opened by me, and after a portion of its contents being used by me in my experimental work in this case, the balance of the sample in this bottle was turned over to Dr. Winton.

Q2. I also show you ten three-ounce bottles, said to contain specimens of the Bibbins syrups, Nos. 1 to

10, respectively, and testified by Dr. Winton to have been received by him from you. Will you please state what these bottles contain and the circumstances under which they were delivered to Dr. Winton by you, if such is the fact?

A. These samples were taken from the balance of the experimental lot from which the samples offered in this case as exhibits by me were taken. I refer to Plaintiff's Exhibits, Sample Syrups No. 1 to 10, respectively. The syrups were transferred to the bottles and labelled No. 1 to No. 10, the same as the exhibits respectively referred to, and were handed by me to Dr. Winton.

Q3. Do these bottles contain a portion of the identical batch of material, as contained in the exhibit syrups No. 1 to No. 10, respectively, and have these portions of said batches been in your possession continuously from the time they were made until they were turned over to Dr. Winton?

A. Yes, sir.

Q4. In answer to Q74, Dr. Beringer testified respecting sample No. 10, stated that it appeared to have been colored, but that the coloring matter is not stated. Was any coloring matter used in this sample?

A. No.

Cross-examination.

By Mr. Rawle:

XQ5. Do you state that the integrity of the manufacturer of the Bibbins samples, their preservation after the sample bottles put in evidence had been taken from them and until the Winton bottles were filled, has all been in your own personal professional care and under your personal professional observation?

A. Yes.

Re-direct-examination.

By Mr. Bradford:

RDQ6. I neglected to ask you if the same facts are true, and applied respecting the ten specimens of

these sample syrups numbered 1 to 10, used and introduced into evidence by Dr. Caspari?

A. They are. I personally filled the Caspari sample bottles from the same original batches and personally handed them to Dr. Caspari.

Deposition closed.

FRANCIS E. BIBBONS.

SAMUEL L. HILTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By MR. BRADFORD:

Q1. Please state your name, age, residence and occupation?

A. Samuel L. Hilton; age, nearly 52; Washington, D. C.; pharmacist.

Q2. Please state the character and extent of your experience, education and work by which you are qualified to testify as an expert in cases requiring knowledge of chemical and pharmaceutical subjects?

A. I am a graduate of pharmacy, having a degree of doctor of pharmacy, having been engaged actively and continuously in the practice of pharmacy for thirty-four years. I was assistant to the chair of analytical chemistry at the National College of Pharmacy, Washington, D. C., for five years. On many occasions I have delivered many lectures on special pharmaceutical subjects to the classes. For eight years I was a member of the Board of Pharmacy of the District of Columbia, its secretary, and having in charge all examinations on theoretical and practical pharmacy.

Q3. Please state what scientific or other societies you are a member of, and any official or committee connections you have with such societies or have had with such societies?

A. I was a delegate to the United States Pharmacopoeia Convention of 1900 and 1910, was elected treasurer of the U. S. Pharmacopoeia Convention in 1910, and still hold that position. While not a member of the United States Pharmacopoeia Revision Committee, I have been active in revision work, and received special notice for my activities in the lists of those who were active, published in the Pharmacopœia. I am a life member of the American Pharmaceutical Association, twice have been a member of its council, and at present vice-chairman of the council. I have likewise been a member of numerous committees of the American Pharmaceutical Association. I am also a member of the revision committee having charge of the revision of the National Formulary. Member of the American Chemical Society.

Q4. You see before you on the table a number of bottles containing preparations, one being a bottle of plaintiff's preparation, Coco-Quinine, another a bottle of defendant's preparation, Quin-Coco, and ten other bottles containing Bibbins Exhibits Syrups Number 1 to 10, also Plaintiff's Exhibit, Bottle No. 1, shown by the evidence to contain Coco-Quinine with cocoa omitted; another, complainant's exhibit, Bottle No. 2, shown by the evidence to contain Coco-Quinine, with yerba santa omitted. I ask you if you have seen these various exhibit bottles before, and if so, when and where?

MR. RAWLE: Same objections as have been noted of record to all of the preceding witnesses, and upon the same ground of irregularity and admissibility and notice of motion to strike out with costs.

MR. BRADFORD: Same agreement to apply.

A. I have, at Mr. Bradford's office in Indianapolis, Indiana, Sunday evening, December 2, 1917.

Q5. Did you examine the preparations contained

in these several bottles, and if you did, will you please explain the character and extent of your examination?

A. I examined them on that occasion as carefully as could be done under the circumstances, and noting their physical characteristics, their odor and taste.

Q6. Are you familiar with the preparation Coco-Quinine, and if so, when did you first become familiar with it and what is the extent of your knowledge of it as a medicine?

A. I am familiar with Coco-Quinine, and if my memory serves me correctly, became familiar first with it about fourteen or fifteen years ago. I have continuously handled the product in my business, dispensing same on physician's prescriptions and to the laity when called for over the counter. It has been perfectly satisfactory as a medicine, and I can testify that it has been what is known among pharmaceutical preparations as a good repeater, persons once using it will repeatedly call for the same preparation when they need such a preparation.

Q7. Are you familiar with Quin-Coco, and if you are, to what extent?

A. With reference to Quin-Coco I know there is such a preparation on the market. The salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine. His offer being rejected on the grounds that it was unfair competition, and when Coco-Quinine was called for it meant a preparation manufactured by Eli Lilly & Co.

MR. RAWLE: The last two questions and the answers are objected to for the additional reasons as irregular at this time and therefore inadmissible, and as irrelevant. The answer to the last question is objected to as volunteered, as stating inferences and not facts. The original objections are repeated.

Q8. Dr. George M. Beringer, when called as a wit-

ness for defendant, testifying in sur-rebuttal at Philadelphia on June 8, 1917, stated that he had examined specimens of these Bibbins samples, being a part of the contents removed from these identical bottles when they were introduced in evidence at the time Mr. Bibbins' deposition was taken, poured therefrom by Mr. Pfeiffer and Mr. Rawle into smaller bottles, and he took up each specimen separately and condemned each and all as pharmaceutically objectionable, unfit and unmarketable and unstable. Assuming that these preparations were made in March, 1916, and have been in the laboratory of Mr. Bibbin from that time until the date of his deposition and in my office in Indianapolis from that day untl Sunday night, when they were brought to this room, I will ask you to express your opinion respecting these qualities of the respective syrups, first will you please take up Sample No. 2, then No. 4, then No. 5 and then No. 6, and state your opinion as a pharmacist of these preparations and whether or not you would consider them stable, satisfactory and marketable?

A. With reference to preparation No. 2, as to stability there is no question in my judgment of its being perfectly stable. As to being a good pharmaceutical preparation I would class it as an elegant pharmaceutical preparation.

As to its marketability I see no reason why it should not be, if the proper endeavors were put back of the preparation to introduce it and bring it to the attention of physicians. It is a far better appearing preparation in every way than many pharmaceutical preparations now on the market enjoying extensive sales. As to the taste I will state that I have tasted this before the examination and am willing to do so again. The taste is perfectly pleasant and showing but a very slight bitter taste, and then only after being in constant contact with the tongue quite a little time.

With reference to Sample No. 4, the same testi-

mony that I have given with reference to Sample No. 2 holds with reference to Sample No. 4. With reference to taste it is very pleasant and showing but a slight bitter taste, and then only after some little while in constant contact with the tongue.

The same testimony that I have given in reference to Sample No. 4 is equally true as to No. 5. While there is a slight sign of separation at the top of the liquid that is entirely immaterial in my judgment and does not affect the marketability of the preparation. With reference to taste, what I have testified with respect to No. 2 and No. 4 is equally true as to Sample No. 5, the bitter taste is but very slight.

Sample No. 6, while this sample shows a little different condition on the upper portion of the bottle, as a pharmaceutical preparation that is immaterial in my judgment and does not affect the marketability of the preparation whatever. Other than that what I have testified to with reference to the previous samples holds true for Sample No. 6. With reference to taste, it is perfectly palatable and shows but very slight bitter taste only after being in contact with the tongue for some little time.

Collecively, I consider all four samples elegant, marketable preparations, that would enjoy a large sale if they were properly exploited.

Q9. In his testimony Dr. Beringer condemned each and all of these preparations without qualification, pointing out many defects in each, and compared them with Coco-Quinine, and stating particularly as to Sample No. 2, that it was decidedly more bitter than Coco-Quinine. I will ask you if what you said about bitterness of these samples is likewise true of Coco-Quinine, and what you have to say about Dr. Beringer's testimony thus referred to?

A. I cannot agree in any way with Mr. Beringer. None of the four samples, in my judgment, develop any more bitterness than Coco-Quinine. In general

appearance the samples, 2, 4, 5 and 6, I believe, show up as better pharmaceutical preparations than Coco-Quinine.

Q10. Will you please consider Samples Nos. 1 and 9 and answer in the same way what you find in reference to these preparations?

A. Sample No. 1 in my judgment is but slightly inferior as a pharmaceutical preparation in appearance when compared with Sample No. 2. As to flavor it is rather pleasant, and it would be no doubt acceptable to a majority of users. As to taste, it is not quite as pleasant as Samples Nos. 2, 4, 5 and 6, in my judgment. You get the slightly bitter taste much quicker than with Samples Nos. 2, 4, 5 or 6.

With reference to Sample No. 9, as to appearance I cannot see the slightest objection as a pharmaceutical preparation of the character of these preparations holding medicaments in suspension. The flavor is decidedly pleasant, and no doubt would be acceptable by many. As to taste, it is more bitter than samples Nos. 2, 4, 5 and 6, you getting the bitter taste in a much shorter period of time.

I would consider both samples No. 1 and No. 9 as marketable preparations, and would no doubt enjoy a large sale if properly exploited, there being many preparations on the market at the present time inferior in character in every way enjoying such sales.

Q11. Without asking you to examine into detail Samples Nos. 3, 7, 8 and 10, which all the witnesses have agreed have developed some degree of bitterness, perhaps exceeding that of the other samples, I will ask you to state as a pharmacist whether you believe that such defect might be overcome by further laboratory experimentation, and whether or not even in their present form or as thus improved they might become marketable preparations?

Mr. Rawle: Specially objected to, because the witness cannot possibly be expected to know or

testify what further experimentation would make these preparations good or what work had been put on them or anything about the formula.

A. I agree that they could probably, with some experimentation, be improved, and I consider that they are all marketable preparations in their present condition, far better than many preparations that are sold by the retail pharmacists to-day.

Q12. What does a "Shake Well" label on a bottle of medicine signify to a druggist?

A. It is a specific direction that the product contains a medicament that is held only in suspension, and for the purpose of securing even distribution the bottle is directed to be well shaken. The pharmacist likewise directs the purchaser of that fact on dispensing a physician's prescription containing substances held in suspension, or when selling direct to the purchaser so that each dose will be practically uniform.

Q13. In Dr. Beringer's testimony he states that a perfect suspending medium for a preparation of this character must have perfect homogeneity and maintain the medicament in even distribution, even after standing for a long period of time. What have you to say as to this?

A. I do not agree with Mr. Beringer. While it is desirable to have a minimum of separation it is practically unobtainable, even on short standing.

Q14. I show you this bottle, Complainant's Exhibit, Bottle No. 1, containing all of the constituents of Coco-Quinine, except cocoa, and ask you if you have tasted the same, and to express your opinion respecting its characteristics, and whether or not it would in itself be a marketable preparation?

A. While the preparation on standing showed some separation, it is on shaking homogeneous and in better condition than very many preparations as to appearance now on the market. As to odor, decidedly pleasant. As to taste, no more bitter than Coco-Quinine or

Samples 2, 4, 5 and 6. As to marketability I can see no reason whatever why it is not as marketable as the other samples about which I have testified.

Q15. Will you also examine and taste Complainant's Exhibit, Bottle No. 2, which contains all of the ingredients of Coco-Quinine, with the exception of the yerba santa, and state what you find as to its taste, etc.?

A. As to appearance, I will say and repeat what I said with reference to No. 1, last referred to. The odor is rather pleasant, but not as pleasant as some of the other specimens. As to taste, the bitterness develops instantly.

Q16. You stated that you were a member of the Committee on Revision of the National Formulary. I believe Dr. Beringer also is a member of that committee, and in his testimony he told us of experiments he had made in an endeavor to make a formula for a chocolate quinine preparation for that book, and expressed the opinion that from an ethical standpoint he was entirely justified in so doing, even with Coco-Quinine as the preparation to work from. What have you to say as to this?

A. Mr. Beringer reported at a session of the National Formulary committee on a preparation of that character that he had been working on a formula for the preparation, that he had failed to make a satisfactory preparation, asking for time to continue his experiments. Several of us, myself included, objected to the inclusion of any such formula, and stated our objections vigorously, that the National Formulary was not to be a receptacle for substitute preparations. As far as I know, no further work was done on the preparation, and the National Formulary IV shows no such formula included.

Q17. What have you to say as to the merits or demerits of benzaldehyde as a flavor for medicinal preparations?

A. I know of no objection based on a sound prin-

ciple against the use of benzaldehyde, and can further say that in the District of Columbia there are several preparations, one of which has been used in rather a large way for many years, both on physician's prescriptions and by direct sale to the public, in which the predominant flavor is benzaldehyde. I further manufacture a preparation myself for physicians' use, and also for a tuberculosis dispensary, where the predominant flavor is benzaldehyde, and have been using it and furnishing same for about six years. Benzaldehyde is also used in certain food products as a flavor, and is a very acceptable flavor.

Q18. What medicinal preparation did you first become acquainted with in which cocoa or chocolate was used as the coloring and flavoring agent?

A. Coco-Quinine.

Q19. How extensively has the use of cocoa gone into use as a coloring and flavoring agent for liquid medicine?

A. I know of none other than the Lilly line that enjoy any sale or reputation in the District of Columbia worth speaking of.

Q20. Is, or is not, the use of coal tar products in medicines objectionable?

A. My opinion is that they are not objectionable, not as much so as many of the animal and vegetable colorings that have been used for some time, for the reason that the accepted colors as specified by the Bureau of Chemistry of the Department of Agriculture are classed as harmless and rightly so in food products, and that they are prepared in laboratories with the greatest amount of care under excellent sanitary conditions, so that you obtain a pure product free from contamination, while with animal and vegetable coloring matters they are prepared in countries foreign to our own by usually the ignorant natives, mostly under the most unsanitary and unfavorable conditions, making it impossible to obtain a pure product that is not contaminated with filthy, nasty foreign material.

Direct-examination closed.

Cross-examination, without waiver of objections.

By Mr. Rawle:

XQ21. When you say that Coco-Quinine is a "good repeater," do you mean that it is well thought of by your customers or your prescribing doctors, and that they are very apt to order it again and again, or call for it again and again over the counter? Is that about what you mean by a "repeater"?

A. Yes.

XQ22. And from the standpoint of the drug salesman who calls on you I suppose a "good repeater" would be a drug or preparation which the salesman had sold to the druggist before and the druggist liked it, and that it was pretty easy for the salesman to sell him some more on the next trip if the drug was out?

A. I don't see that the drug salesman has anything to do with it; it is what the physicians and what the public want.

XQ23. Is the expression, a "good repeater," a familiar one among the druggists, or with you?

A. It is quite a familiar one among the druggists with reference to preparations for which there is a good sale.

XQ24. That is a steady demand?

A. Yes.

XQ25. And may not the expression have gotten into the mouths of the drug salesmen, so that they have been talking or do talk sometimes of a preparation being a "good repeater," meaning that there is a steady demand for it among their customers?

A. Not being a salesman I am unable to state what their view is.

XQ26. In tasting the Bibbins Samples 2, 4, 5 and 6, this morning, you inverted the bottle, leaving some of the contents on the bottom of the cork, removed a little of the contents on your finger and placed it on your tongue, in each case. Is that correct?

A. It is, and I consider I got an average sample for the test.

XQ27. Then, as I timed you, you would wait for about twenty seconds and then begin to answer the question put to you by counsel?

A. That is correct, and the answer was not forthcoming until the moment I began to obtain the slightest bitter taste, which I consider, without timing, to be at least thirty seconds in each case, instead of twenty seconds, possibly longer.

XQ28. And this elapsed period of at least thirty seconds is what you referred to in answer to one of the questions when you said that Sample No. 4 showed "but a slight bitter taste, and then only after some little while in constant contact with the tongue"? Is that correct?

A. That is.

XQ29. And in tasting those first four samples you did nothing in tasting the samples to remove from your organs of taste whatever might have remained thereon from the tasting of the preceding sample. Is that correct?

A. That is not correct, as I rinsed my mouth with water on each occasion in the presence of counsel.

XQ30. Then, to be perfectly fair to you, I understand that you did rinse your mouth after each sample before you tasted the next?

A. That is correct.

XQ31. I understand that your phrase "elegant pharmaceutical preparation," in answer to Q8, is a common phrase to indicate a good appearing preparation, and such a one as you as a leading druggist in Washington are willing to carry on your shelves. Is that correct? I would like you to assume that the preparation has merit of its own, in your belief.

A. I used the term in a different sense, and in this way to distinguish from the ordinary extemporaneous preparation, as, for instance, a physician's prescription, from one that is the result of careful research and experiment, that has not only qualities of merit, but is of itself elegant in every sense of the word.

XQ32. In testifying that this Bibbins article No. 2 was "an elegant pharmaceutical preparation," what qualities in the Bibbins bottle No. 2 before you did you consider as the basis of such an opinion?

A. I think my answer sufficient, and covered the main points of my observation.

XQ33. How can you, sitting there, pick up one of the bottles before you and properly give any opinion as to the "stability" of the preparation in that bottle?

A. I testified at the start that I had examined those preparations Sunday evening, December 2nd, 1917; that it was admitted that these samples were over one year old at the time they were presented to me, and that I think that is sufficient to show that they had not undergone any change when the contents of each package clearly shows that they are free from fermentation, and that they are homogeneous mixtures and that they are practically tasteless.

XQ34. How can you properly testify to the homogeneity of the contents of Bibbins No. 2, except so far as to say that it looks homogeneous at the present moment?

A. The only means at my command at the time of giving the testimony to more minutely define that question was not available, and I was therefore compelled to rely upon the physical appearance, as presented to the eye.

XQ35. Bibbins Samples 3, 7, 8 and 10 were not tasted by you while testifying. Is that correct?

A. The record should show that. I do not remember those numbers at this time. I admit that there were some I did not taste.

XQ36. Have you at this sitting today tasted Coco-Quinine or Quin-Coco?

A. I have not.

XQ37. Then, of course, you have not compared the degree of bitterness of the Bibbins samples you have tasted with any degree of bitterness in Coco-Quinine and Quin-Coco, have you?

A. With Coco-Quinine I have made no comparison to-day, for the reason that I am so familiar with the product, having tasted it possibly several thousand times in which I have handled it, that I did not consider it necessary. With Quin-Coco I believe that that question is immaterial, as I was not requested to make the comparison, and that I am not familiar with the product other than that there is such a product in imitation and offered as a substitute for Coco-Quinine.

XQ38. Is it true that Coco-Quinine is rather largely sold in prescriptions and over the counter for children?

A. It is.

XQ39. Apparently because it is not bitter to the taste?

A. That is probably one of its advantages.

XQ40. In your answer to Q7, in referring to Quin-Coco, you said that "the salesman of the house that makes it offered it to me four or five years ago as a substitute for Coco-Quinine." At what store?

A. At my place of business, 1033 Twenty-second Street, N. W., Washington, D. C.

XQ41. Have you ever stocked the goods of Wm. R. Warner & Co., of Philadelphia?

A. Some of them.

XQ42. Who was that salesman?

A. That I am unable to inform you now. I don't remember his name.

XQ43. Might it have been longer than four or five years ago? Have you any means of approximating the date more closely?

A. From the data that I used to locate the occasion, that is approximately as close as I can state it.

XQ44. What was the data that you used?

A. It was considerably before the death of my partner and brother-in-law, who died three years ago September 9th, that we were looking over these samples together for the purpose of placing an order for

the purchase of certain specialties of Wm. R. Warner & Co., for which we had demand.

XQ45. How fully at that time did you go through that salesman line?

A. Quite extensively, and I believe that I examined practically everything that he had in his sample case. There being a number of pharmaceutical preparations along the general line of pharmaceuticals which I manufacture myself, and at which time I made comparisons of the salesman's sample with my own product.

XQ46. Mention some of those preparations of yours which you compared with his products?

A. Elixir of phosphates of iron, quinine and strychnine, U. S. P. VIII; glycerophosphates compound, no sugar is now official in N. F. IV; several elixirs N. F. III; several tinctures, U. S. P. VIII.

XQ47. Besides his line of samples, did you to any extent go through the rest of his line?

A. Only his particular specialties, for which I had demand on physicians' prescriptions.

XQ48. State what this salesman said to you in trying to sell you his Quin-Coco. Give his exact words and your exact reply in direct statement.

A. As close as I can possibly state Quin-Coco was presented and offered as a tasteless quinine preparation, to use instead of the product of Lilly & Co., and he said it costs you much less. My reply was I use no substitutes, prices does not enter into the consideration; Coco-Quinine is a specialty of the firm of Lilly & Co., placed on the market after proper experiment and investigation on their part, and that they were entitled to reap the reward for their endeavors, and that when I received a prescription or a call for Coco-Quinine the physician and the person making the call had only one product in view, and that product was the product of Eli Lilly & Co.

XQ49. Can you now say positively after this in-

terval of four or five years that you made that long speech to the salesman, and in just the words you have now used?

A. I have purposely eliminated a portion of what I used at the time, because I consider that the language would not look well in testimony. We had quite an argument on that question.

XQ50. Did this salesman say to you that he could sell you a tasteless chocolate quinine preparation, and that it was medicinally similar to Lilly's Coco-Quinine and would sell it at a less price? Is that about what he said?

A. His statement was on presenting the sample. "Here is Coco-Quinine; we have it perfectly." That was the statement that caused a protracted argument, to which I have previously referred in answering another question.

XQ51. Of course, you knew at the time that he was a Warner salesman, and that he was not selling Coco-Quinine, Lilly, did you not?

A. He not only offered that substitute, but as my memory now serves me several other substitutes for other products. So that I almost came to the conclusion that he was offering a line of substitute products for well known pharmaceutical specialties.

XQ52. Question repeated.

A. I think I have answered that I knew he was a Warner salesman, and have stated exactly what he did.

XQ53. Did you or did you not know at the time that the preparation he was offering you was not a preparation manufactured and put on the market by Lilly?

A. That is self evident. He was selling goods for Warner & Co.

XQ54. Then when this salesman said as you have testified (in XQ50): "Here is Coco-Quinine," you understood that he meant that he had an article similar to Coco-Quinine, but not real Coco-Quinine, made by Lilly, did you not?

A. No. I definitely understood that he deliberately offered the preparation of Warner & Co., as a substitute and to be sold for Coco-Quinine.

XQ55. Did you see his labels at that time?

A. The sample from the sample case contained a small label, as I remember it. The sample was offered to me for examination, and I refused even to take the sample and look at it, so that I am unable to state exactly how it was labelled.

XQ56. I show you the pint bottle of Warner's Quin-Coco. Does that remind you of the label the salesman had? (Bottle shown witness was "Complainant's Exhibit, Bottle No. 5.")

A. That was not the package, or anything like it. The sample exhibited was from a salesman's sample case, the bottle being the ordinary homeopathic sample vial, probably holding about two fluid ounces.

XQ57. Had it a label?

A. I testified a moment ago that my recollection is that it had a label of some kind on it, and I further testified that I refused to examine the package and could not state how it was labelled.

XQ58. Was the name Quin-Coco mentioned between you in this talk?

A. It was not, as I remember.

XQ59. How long did that controversy over this article last?

A. If my memory serves me correctly, very near thirty minutes. We had several controversies in discussing various products, and I am of the opinion now that the salesman was in my store for at least two hours.

XQ60. How long did the controversy over Quin-Coco last?

A. The previous answer will show.

XQ61. I venture to ask you to answer it again.

A. I have testified to about thirty minutes.

XQ62. But you said that you did not talk all that time about Quin-Coco, did you not?

A. I did.

XQ63. And therefore, I now ask you how long you talked about Quin-Coco?

A. I again testify that I stated that we discussed that question about thirty minutes, and that the entire interview lasted about two hours.

XQ64. What did the salesman state as to the nature or composition of the preparation he was then offering you? I mean the tasteless quinine preparation.

A. As close as I can remember his statement was to the effect that it had all of the properties of Coco-Quinine, and why pay the price. This started the argument.

XQ65. And I think you have said that at that interview this salesman offered you a number of other Warner articles, which were in competition with articles of similar medicinal value made by other houses, and pressed them on your attention. Is that correct?

A. That is as I remember it.

XQ66. Might there have been a dozen of such other articles?

A. I would not like to state the number of such articles, for the reason that after our argument on this particular preparation he pursued different tactics.

XQ67. Please name some of the other articles that you had a controversy about?

A. A substitute for lapactic pills, S. & D.; a substitute for alophen pills, P. D. & Co., and I think some cascara preparation, but I cannot call that to mind at this time.

XQ68. A substitute for listerine.

A. I think there was.

XQ69. Lactopeptin, or a like article?

A. If my memory serves me correctly there was a preparation as a substitute for elixir of lactopeptin.

MR. BRADFORD: I have refrained from objecting to this line of questions, hoping that it would

soon conclude, but I must interpose an objection that it is entirely improper, not being cross-examination in any sense of the word.

XQ70. Elixir salicylic comp. or any like preparation?

A. They would hardly offer me a substitute for elixir of salicylic Comp., when that is their own preparation.

XQ71. Did he offer you elixir salicylic comp.?

A. It was a perfectly legitimate offer. It was one of their preparations that I purchased at the time. It was one of their specialties, to which they are entitled to a just reward of their labors for introducing the preparation, the same as Eli Lilly & Co. are entitled to the just reward on their preparation Coco-Quinine.

XQ72. At that time had you been handling a preparation similar to the salicylic comp. of any of the other houses?

A. I have never handled anything but Warner's Elixir Calycylic Comp., and would not, because I believe firmly that that is their product, and that they are entitled to all the business on that product and when that product is demanded I know of no other product than Warner & Co.

XQ73. You mean then that when the Warner product is called for you know no other?

A. I know of no other product than the product of the manufacturer who makes a specialty when that product is called for.

XQ74. But you know that Parke, Davis, Lilly, Mumford, Sharp & Dohme, Wyeth and Wampole all market a preparation similar to elixir salicylic comp.?

A. I do not. I know only Warner's preparation, or as far as I can recollect I never heard of the others.

MR. RAWLE: Mr. Rawle moves to strike out so much of the deposition of this witness as is other than of an expert nature, upon the ground that no

notice has been given of the calling of this witness on facts, but only as an expert, and because the evidence on facts that he has given is inadmissible at this time, and repeats the motion to strike out.

Re-direct-examination.

By Mr. Bradford:

RDQ75. In taking medicine, does a person hold it in the mouth more than thirty seconds? I refer, of course, to medicine of the character we have been considering.

A. I should say they hold it very much less than thirty seconds. The inclination is to swallow as quickly as possible, and I am of the opinion that they do so in less than ten seconds.

Deposition closed.

Sam'l L. Hilton.

IN THE
DISTRICT COURT OF THE UNITED STATES,
Eastern District of Pennsylvania.

IN EQUITY.

THE ELI LILLY & COMPANY, a Corporation,
Plaintiff,

vs.

WM. F. WARNER & CO., a Corporation,
Defendant.

District of Columbia, }
City of Washington, } *ss.*

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff in the above

entitled cause were taken before me, pursuant to notice and agreement of counsel, as follows:

At Washington, D. C., November 7th and 8th, 1917:

Samuel H. Bell,
Ellis Walker Howard,
R. H. Greene,
W. R. Bell,
Edmond Francis O'Connell.

At Indianapolis, Ind., December 3d, 4th and 5th, 1917:

James H. Beal,
Charles E. Caspari,
J. B. Weldon,
F. C. Atkinson,
Andrew L. Winton,
Francis Bibbins,
Samuel L. Hilton,

that each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the depositions of said witnesses was read over by him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause, and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit. I further certify that the exhibits placed in evidence before me in the course of examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 5th day of December, 1917.

(Seal)

CHARLES E. RIORDON,
Special Examiner.